IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 13245.

WESTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*
BONANZA AIR LINES, INC., *Intervener*

BRIEF OF BONANZA AIR LINES, INC.

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BASIS OF JURISDICTION.

1. Jurisdiction of the Civil Aeronautics Board.

The jurisdiction of the Civil Aeronautics Board to issue the order here under review is based on Sections 401(d)(2) and 401(h) of the Civil Aeronautics Act as amended (49 U.S.C. 481; 52 Stat. 987).

2. Jurisdiction of this Court.

Western's petition for a review of the Order of the Board was filed under Section 1006 of the Civil Aeronautics Act (49 U.S.C. 646; 52 Stat. 1024) and Section 10 of the Administrative Procedure Act (5 U.S.C. 1009; 60 Stat. 243).

STATEMENT OF THE CASE.

In essence, the Civil Aeronautics Board's Order here under review (E-6040, dated January 17, 1952), did five things:

1. It denied Southwest Airways' amended application for an extension of its route from Los Angeles to Phoenix via San Diego, El Centro, Yuma and various other intermediate points.

2. It denied Petitioner, Western Air Lines, then possessing, *inter alia,* a Los Angeles-San Diego-El Centro-Yuma route, an extension from Yuma to Phoenix. This was the *fourth* time that the Board had found that the extension of Western to Phoenix was not in accord with the public convenience and necessity (see pp. 10-11 of Western's brief herein).

3. It suspended for a limited period of time Western's authority to serve *El Centro* and *Yuma.*

4. It suspended the authority of Frontier Air Lines (successor to Arizona Airways) to serve a Phoenix-Ajo-Yuma route.

5. It granted to Intervener, Bonanza Air Lines, a route extension from Phoenix to Long Beach and Los Angeles via Ajo, Blythe, Yuma, El Centro, San Diego, Oceanside and Santa Ana/Laguna Beach.

The area problem at which the Order here under review was directed had in one form or another been under consideration by the Board for nearly ten years.

Western's authority to serve El Centro was granted by the Board in 1943 (*T. W. A. et al., North-South California Case,* 4 C.A.B. 254). In 1946 the Board granted Western authority to serve Yuma (*Rocky Mountain States Service* case, 6 C.A.B. 695).

Arizona Airways, Inc., in February, 1948, was, among other things, authorized to provide service between Phoenix

and Yuma, via Ajo (*Arizona-New Mexico* case, 9 C.A.B. 85).

Western thereafter entered into an agreement with Arizona Airways whereby Western would transfer its Yuma-El Centro-San Diego route to Arizona, and in July 1948, filed an application with the Board for approval of such agreement (*Western-Arizona Agreement* case, Dkt. No. 3440).

Western then filed with the Board on March 16, 1949, an application to suspend its authority to serve Yuma and El Centro, i.e., to suspend its Yuma-El Centro-San Diego route. Western sought this suspension on the express ground that its service over that route was uneconomical (Dkt. No. 3768).

On June 15, 1949, the Board issued its opinion in the original *Additional California-Nevada Service* case, 10 C.A.B. 405. In that case there was in issue the question of a route from Los Angeles to San Diego and a route from Los Angeles to Phoenix, via a routing north of the route granted in the instant case. The Board deferred decision on that question for further consideration with the *Western-Arizona Agreement* case, *supra*, or until such time as the Board might determine final action thereon to be appropriate.

Within a short time thereafter it became apparent that Arizona Airways could not get its own routes activated and that Arizona would be unable to go through with its agreement with Western to purchase the latter's San Diego-El Centro-Yuma route.

Western then withdrew its application for Board approval of the Western-Arizona transfer agreement and also withdrew its application for suspension of its San Diego-El Centro-Yuma route authority. Not only did Western withdraw its suspension application but it again filed an application for extension of its San Diego-El Centro-Yuma route to Phoenix.

Subsequently, on December 19, 1949, and without further hearing, the Board issued a Supplemental Opinion in the *Additional California-Nevada Service* case (E-3727), awarding a route to Southwest Airways between Los Angeles and Phoenix by substantially the same intermediate points here in question, though the route granted was not the route for which Southwest had applied. Moreover, it granted the Western application for suspension at Yuma and El Centro, which application Western had prior to that time directed be withdrawn. It further directed Western to show cause why its service at El Centro and Yuma should not be suspended for as long as Southwest held authority to serve those points.

The award to Southwest, however, carried an effective date some several weeks into the future, and an express reservation by the Board of freedom to postpone it from time to time as may be deemed necessary. It was twice postponed while petitions for reconsideration, re-hearing and re-argument were being filed and considered. Ultimately, after considering various challenges to the validity of the order awarding the route to Southwest, those challenges being advanced primarily by Western, the Board on March 10, 1950, rescinded its Order awarding the route to Southwest. Its March 10 order (E-3975) set forth the Board's belief that the entire question of the need for local service between Los Angeles, San Diego and Phoenix could best be determined by contemporaneous consideration with the question of Western's application for extension from Yuma to Phoenix, the question of the need for Western's suspension at Yuma, El Centro, Palm Springs and San Bernardino, and the question of the need for the suspension of Arizona (later Frontier) at Yuma and Ajo.

The *Additional California-Nevada Service* case (Dkt. No. 2019 et al.; E-3727, dated December 19, 1949), insofar as it concerned Southwest's application for a Los Angeles-San Diego route, and for a Los Angeles-Phoenix route was then re-opened for further hearing (E-3975, dated March

10, 1950), Southwest was granted leave to amend its application so as to request also a route from San Diego to El Centro (so that its application would conform substantially to the route which the Board had earlier awarded to Southwest). The suspension dockets of Western and Arizona were consolidated therewith, as was Bonanza's application for a Los Angeles-San Diego-Phoeniz route (via various intermediate points—a route substantially the same as that ultimately awarded to Bonanza).

Thus, in a situation that had become highly complex and frought with innumerable legal and economic difficulties, the Board determined to make a fresh start and obtain a comprehensive, sound and equitable decision at the earliest possible date. It can fairly be said that as administrative proceedings of this type go, involving as they do complex economic and policy considerations, the *Re-opened Additional California-Nevada Service* case was processed expeditiously, beginning in May, 1950. Hearing on the case was completed in January 1951, and the Board's order here under review was rendered in January 1952, some 12 months later.

It should be noted in connection with Western's service to Yuma and El Centro that from early in 1947 until January 1950, shortly after the Board first proposed to suspend Western at those points, Western provided Yuma and El Centro with only *three* round-trips *weekly.* Moreover, Western admitted at the re-opened hearing in this case that it was only *after* and *because* of the Board's move to suspend Western at these points that Western increased its service there from *three* round-trips *weekly,* to two round-trips *daily*—for the express purpose of resisting the Board's suspension proposal. Its *thrice-weekly* service at Yuma and El Centro was therefore the pattern for about three years, although it had generated a substantial number of passengers at El Centro in 1946 when it inaugurated service and provided two round-trips daily (See Western's brief herein, Appendix "A", pp. 5-6).

The Board, after notice and hearing, ordered Western *suspended* for a *limited period of time* at Yuma and El Centro. The suspension in this instance is for a considerably shorter period of time than is customary. It runs until December 31, 1952, the expiration date of Bonanza's own original certificate, or until final determination of Bonanza's own certificate renewal application if timely filed, whichever date should be the later. As to the question of suspension there is no question of notice and hearing in issue.

In effect Western challenges the Board's action in taking Western out of the two cities in question, whether the action was permanent or temporary, and whether it was a revocation or suspension action Bonanza, intervener and recipient of the route award in this case, fully supports the authority and action of the Board with respect to all parties to the proceeding, and urges complete affirmance by this court of the Board's statutory authority and also urges an early lifting of the stay order entered herein. The Board of course actively defends its own order.

QUESTIONS INVOLVED.

The Board's action here under review is predicated primarily on Section 401(h) of the Civil Aeronautics Act. Section 401(h) of Title IV reads as follows:

> "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title, or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order

issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

Western's position is that the Board's order is invalid because it *revokes* rather than *suspends* Western's certificate at these points, and that the *revocation* requirements of the Act have not been complied with. Western argues further that even if the Board's action is deemed to be a suspension, a suspension cannot be ordered for the purpose of putting in another carrier. And lastly, they urge that there has been a violation of the Fifth Amendment of the Constitution—the prohibition against the taking of property without just compensation.

The Board's order directs Western's suspension for a limited period of time at Yuma and El Centro. It authorizes intervener Bonanza, for the same limited period of time, to render local service between Los Angeles/Long Beach on the one hand and Phoenix on the other, via the intermediate points Santa Ana/Laguna Beach, Oceanside, San Diego, El Centro, Yuma, Blythe and Ajo.

The principal questions are: (1) Whether the Board in fact *revoked* Western's authority at Yuma and El Centro? (2) If the Board so *revoked* Western's authority at these points, did it do so lawfully? (3) Did the Board in fact suspend petitioner's certificate for Yuma and El Centro for a limited period of time? (4) If it did so suspend petitioner's authority at those points, did it do so lawfully? (5) Did the Board's order deprive petitioner of any property rights without just compensation, in violation of the Fifth Amendment of the Constitution?

SUMMARY OF ARGUMENT.

1. The promotional, remedial and developmental purposes of the Civil Aeronautics Act, together with Section 401(h) of the Act, underlie, support and justify the Civil Aeronautics Board's suspension power and the manner in which the Board has here exercised such power, and an affirmance by this Court of that power and its exercise herein are necessary to the proper attainment of the objectives of the Civil Aeronautics Act.

2. The Board's order here under review does not *revoke* Western's authority to serve Yuma and El Centro.

3. The Board, after notice and hearing, and upon its own initiative, has the unequivocal statutory power to suspend a so-called permanent certificate, in whole or in part, for a limited period of time if, as found in this case, the public convenience and necessity so require.

4. The affirmance by this Court of the Board's order of suspension will not be conducive to instability in the air transportation industry.

5. Petitioner has not been deprived of its property without just compensation in violation of the Fifth Amendment of the Constitution.

ARGUMENT

1. The promotional, remedial and developmental purposes of the Civil Aeronautics Act, together with Section 401 (h) of the Act, underlie, support and justify the Civil Aeronautics Board's suspension power and the manner in which the Board has here exercised such power, and an affirmance by this Court of that power and its exercise herein are necessary to the proper attainment of the objectives of the Civil Aeronautics Act.

Petitioner's challenge of the Civil Aeronautics Board's suspension power has inherent in it a construction of the

statutory authority of the C.A.B. Under the provisions of Title IV of the Civil Aeronautics Act of 1938, (52 Stat. 973, (1938), as amended, 49 U. S. C. 401 *et seq.* (1946)) no air carrier may engage in air transportation unless there is in force a certificate of public convenience and necessity issued by the C.A.B. authorizing such service (Section 401 (a)). Certificates may be issued upon application after notice and hearing if the carrier is fit, willing and able to perform the service, and if the public convenience and necessity (the elements of which are set forth in Section 2 of the Act) require the service (Section 401 (b) (d).

Each such certificate shall be effective from the date specified therein, if issued for an *unlimited* period, and shall continue to be effective *until* "suspended or revoked" by the Board, or if issued for a temporary period, until the expiration date, unless sooner suspended or revoked (Section 401 (g)). Each such certificate must specify the terminal points and intermediate points which the air carrier is authorized to serve, and specify the nature of the service that is to be rendered thereunder (Section 401 (f)).

Section 401 (h) of the Act provides that the Board acting upon petition or complaint "or *upon its own initiative,* after notice and hearing, *may alter, amend, modify, or suspend* any such certificate, in whole or in part, *if the public convenience and necessity so require,* or *may revoke* any such certificate, in whole or in part, for intentional failure to comply with any provision [of the law]." Certificates may not be transferred (Section 401 (i)) nor abandoned (Section 401 (k)) without prior approval of the Board upon a finding that the public interest requires transfer or abandonment.

No merger, consolidation or acquisition of control may be achieved without prior Board approval (Section 408), and under Section 409 (a) interlocking relationships are outlawed unless approved by the Board upon a finding that such acts are not inconsistent with the public interest or adverse thereto. By virtue of Section 412, inter-carrier

agreements must be disapproved by the Board if they are adverse to the public interest, and Section 410 permits the Board to order a carrier to cease and desist from unfair methods of competition.

Certificates conferred by the Board give the carrier no proprietary, *property interest* or any exclusive right to use any air space (Section 401 (j)). Moreover, in the exercise of its functions under Title IV of the Act, the Board is authorized to establish from time to time such just and reasonable classifications of carriers or groups of carriers "as the nature of the services performed shall require." (Section 416 (a)).

In addition to its basic licensing functions under the Act, the Board is given authority over rates and charges to require that they be just and reasonable, and not unduly discriminatory (Section 403 *et seq.*).

Those then are the basic tools with which the Board was endowed by the Act to achieve the high purposes of the framers. They are the economic *means* by which the Board through regulatory control was enabled to achieve the public interest *end* in the development of an economically sound air transportation system. But as means to an end, it is essential that the end be recognized and understood in order that action taken to achieve that end may have meaning in its proper perspective.

In order to determine what the *end* envisioned by the Act was, it is not necessary to blow the dust off Congressional Records, or turn the yellowing pages of Committee reports. The framers of the Act spelled out in very precise terms what the end was to be—what was the *raison d'etre* for the regulatory powers given the newly created Board. Their purpose and their end is set forth in Section 2 of the Act which is entitled "Declaration of Policy" and it is from that section that we are able to glean purpose and meaning for the *tools* granted the Board. Now just what was this C.A.B. created to do? Section 2 states that the public convenience and necessity for whose interest and

protection the Act was adopted *shall be deemed to include,* among other things, *the following:*

(a) The encouragement and development of an air transportation *system* properly adapted to the *present and future* needs of the . . . commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to *recognize and preserve the inherent advantages of,* assure the highest degree of safety in, and *foster sound economic conditions in,* such air transportation, and to improve relations between, and *coordinate* transportation by, air carriers;

(c) To promote *adequate, economical* and *efficient service* by air carriers.

(d) To permit competition *"to the extent necessary"* to assure the *sound* development of an air transportation *system* properly adapted to the nation's commercial, postal and defense needs;

(e) The regulation of air commerce in such manner as to best promote its development.

It is patently clear that such worthwhile objectives could not be achieved by maintaining the *status quo* at any given point or any given time, recognizing that the Board was charged with the duty to "develop", "promote", "protect" and, in juxtaposition, to *"regulate"* in order to develop, promote and protect. It was charged with the duty to *regulate* for the purpose of preserving the inherent advantages of air transportation, just as other regulatory bodies have been charged with the duty of recognizing the inherent advantages of highway and/or rail service. (See *e.g.,* National Transportation Policy announced in the 1940 Amendments to the Interstate Commerce Act, 54 Stat. 899, amending 49 Stat. 543, 49 U. S. C. 301 (1946)). It was

charged with the duty to *regulate* to develop a *system* that was *economically sound,* and responsive to *the present and future* needs of the nation's commerce, postal service and defense. It was charged with the duty to *regulate* to assure that the service was *efficient* and *adequate,* and to insure its *development.*

Judicial recognition of this power to regulate to achieve the ends set forth in the Declaration of Policy is expressed in *American Airlines* v. *C.A.B.,* 192 F.(2d) 417 (D.C. Cir. 1951). That Court in discussing the propriety of a reliance on policy determinations under Section 2 of the Act said:

> "In the first place, Congress expressly directed that the Board consider, as being in the public interest and in accordance with the public convenience and necessity, the development, encouragement and promotion of air transportation. . . . Whatever belittling significance may be attached to the fact that those provisions were under a title 'Declaration of Policy,' they are in the statute, are peremptory, and are as much an enactment by the Congress as is any other section of the statute. * * * In the second place, the regulatory function, certainly insofar as it includes permissive certificates, is a forward-looking function, as any examination of regulatory measures easily demonstrates. In that respect it differs markedly from a purely judicial or quasi-judicial determination of present or past rights. Much confusion has crept into the subject by failure to observe that distinction."

In the light of those conditions, it cannot be supposed that the Board was set up merely to function in the capacity of licensor, and having exercised that function, to become sterile. On the contrary, when the framers of the Act had agreed upon the end to be achieved, they set about to arm the newly created authority with the tools, the means to achieve that end, and they did so in no uncertain terms. But they were not unjust in their demands; they gave as well as took, and the balance they agreed upon was struck in a revolutionary statute, one unparalleled in the

history of public utility regulation in this country. An appreciation and an understanding of how that balance was struck is essential to an intelligent determination of the problem posed in this case.

There is no need here to recount the economic conditions that existed in air transportation before the adoption of the Civil Aeronautics Act. In that sense, the past *is* prologue, but the fact remains that conditions were so chaotic that the industry itself begged for help and protection. The Civil Aeronautics Act was no offspring of the so-called New Deal "brain trust"; it was the result of hard felt necessity for federal aid and federal protection to a young and promising industry. It was no depression panacea conjured up in confusion and imposed upon an unwilling but helpless group. The Civil Aeronautics Act was the product of a cooperative movement between government and industry in the mutual recognition that the business was peculiarly one affected with the public interest, and one that ought to be assured against the chaos and disaster of cut-throat competition and inadequate or inefficient service on the one hand, and inadequate or inefficient financing on the other. The result of this cooperative movement was the adoption of the Act which in return for the bounty and protection given, required the industry to continue to cooperate toward the achievement of the goals set. But recognizing that future generations might reject any notion of being governed from the grave, the Act was drafted to give the Board the authority to force, if necessary, continued cooperation to achieve the ends set forth in the Act, and even that authority was not demanded without necessity nor required without concession.

As we have seen, Title IV of the Act gives the Board the necessary tools to carry out the declaration of policy of the Act. That is the regulatory side of the coin, the teeth, as it were, to assure that the purposes of the Act would not be frustrated by recalcitrant benefactors. But the other side of the coin represents what the government gave, in exchange, for the authority to regulate *in futuro*.

Title IV of the Act, in addition to its regulatory features contains provisions of bounty rarely if ever found in public utility law. Under those provisions by which carriers serve among other things the postal needs of the country, they are entitled to receive "reasonable compensation" for such service (Section 401(m)). And in determining what shall be reasonable compensation for such mail service, the Act departs from a new springboard; the carrier is not merely paid the *reasonable cost* of transporting the mail, but is paid under the standards established in Section 406 (b) of the Act, the significant ones for our purposes being that in fixing and determining the fair and reasonable rate of a compensation, the Board may fix different rates for different carriers and different classes of carriers, and in determining the rate in such case must take into consideration, *inter alia, "the need* of each such carrier for compensation . . . sufficient to insure the performance of such service, and, together with all other revenues of the air carrier, to enable such carrier under honest, economical, and efficient management, to maintain and continue *the development of air transportation to the extent and of the character and quality required for the commerce . . ., the Postal Service, and the national defense."* By that provision the government undertook one of the most gigantic underwriting programs in history to that date. It issued to the carriers, subject to the terms, conditions and limitations of the Act, a federal insurance policy whose yearly dividends have been as high as 112 million dollars or more, at least 40 to 60 per cent of which is said to be sheer subsidy. (See, *e.g.,* Johnson, Sen. Edwin C., *Proposed Senate Action on Air Mail Subsidies,* 17 J. Air L. & Com. 253 (1950)).

That it was neither the intent of the Act nor the purpose of the Board to underwrite and thereafter perpetuate air service that is not *wholly responsive* to the public convenience and necessity as defined in Section 2 of the Act is too obvious to argue. The Board recognizes that fact and the industry recognizes it. President Eddie Rickenbacker of

Eastern Airlines underscored the industry acceptance of the notion that in order to be justified the service must be required by the public convenience and necessity and operated in accordance with sound economics. "A tragic error which has been committed . . . has been the assumption that . . . the mail pay section—of the act ha[s] set air transportation apart . . . and ha[s] made it immune to the grim necessities of sound business practices and ha[s] promised it a blank check and ha[s] guaranteed each air carrier a livelihood at the expense of the taxpayers." (*Airline Industry Investigation,* Hearings pursuant to S. Res. 50 before the Committee on Interstate and Foreign Commerce, United States Senate, 81st Cong., 1st and 2d Sess. (April 11, 1949-Jan. 31, 1950) at p. 1112).

The plain facts are that the Board in determining what services are required by the public convenience and necessity as defined by Section 2 of the Act has a very clear duty under the Act to protect the United States Treasury from undue and unnecessary burdens and to insure that the monies spent out of that Treasury produce the maximum public benefit. In discharging that duty, the Board has the authority under the Act to certificate service and to continue such service under a certificate *only* so long as the public convenience and necessity require it. It would be violative of the Board's duty under the Act to permit or continue a service that was either unjustifiably uneconomic or not responsive to public need, or which did not preserve the inherent advantages of air transportation and contribute to its development, its soundness, its adequacy and efficiency.

The Board, in the exercise of its powers under Title IV is required to supervise on a *continuing basis* the services that are performed to insure that they are responsive to the requirements of the public interest. When facts are presented to the Board which show, under the public convenience and necessity tests set-forth in Section 2, that the service of a carrier is no longer required it is the

Board's statutory duty, at least for an experimental period, to re-arrange the route pattern to the extent necessary to suit the requirements as they are then shown to exist. Section 401 (h) of the Act provides the Board with authority to take just such action.

Were it otherwise, this would be an anomalous purse without purse-strings and although Shakespeare said "He who steals my purse steals trash," one would suppose that the purse there concerned was something less in stature than the federal treasury. Congress, the Board and the industry itself have grave public responsibilities under this Act. Unless we are to abandon all concepts of public morality, not to mention all concepts of legality, the right of the Board to take the action here complained of must be upheld.

The basic balance between what the government gave and what it demanded is thus reflected in the Act's various provisions. Section 401 (h) merely insures that the balance will be maintained. Under previous regulatory acts where the subsidy provisions were not present, it was safe to assume that whenever an amendment or an alteration was necessary in the basic certificate for economic reasons, that is, necessary because of a change in the requirements of the public convenience and necessity which was reflected unfavorably in the carrier's earnings or financial position, that the carrier would apply to the regulatory agency for the necessary relief. Under those conditions, statutes which permit alteration, modification or suspension of a certificate "upon the application of the holder," as the Motor Carrier Act does for example, were adequate to protect both the carrier on the one hand and the public interest on the other. The carrier was protected by virtue of his right to make application for a change in his certificate which he would unquestionably do if the conditions made the service in question economically unjustifiable, and the public interest was protected by the authority of the Commission to grant or deny the relief requested.

But the instinctive motivating factors which move the carrier to act on its own motion in the absence of subsidy provisions to fall back on are not present once a protective subsidy provision comes into play. Then by virtue of the guarantee against losses, the carrier has no incentive to correct uneconomic conditions under the certificate; he is for all practical purposes *insured* against loss, so the public interest plays little if any part in the carrier route program considerations.

Under those circumstances unless the regulatory authority is empowered to act on its own initiative *to correct* or *prevent* uneconomic conditions or to *correct* or *prevent* inadequacies or inefficiencies in service under the certificate, then the cost to the government is beyond practical control, and the requirements of the public convenience and necessity are ignored. It was to avoid or to cure just such a situation that Section 401 (h) was put into the Civil Aeronautics Act and it was because such a situation was wholly unlikely to arise without the existence of the subsidy provision that no similar authority is found in other federal regulatory Acts.

It is no answer to claim as Petitioner does that it no longer requires government subsidy and that it therefore should in effect be free of government supervision and direction. In the first place it is highly questionable whether Petitioner is in fact now operating without direct government subsidy. In the second place it is an indisputable fact that Petitioner is and will be for many years to come the beneficiary of millions of dollars in federal funds spent on airways, airports and numerous other direct and indirect services and facilities. Thirdly, as Petitioner well knows, if tomorrow should bring a sudden shift in the new rising economic current in which the nation is moving as it well may do, Petitioner would be one of the first to fall back on the subsidy guarantee provisions of the Act and would be entitled to be made whole from the date on which its mail rate adjustment petition was *filed* with the Board.

Moreover, it will be readily apparent to the court that even if Petitioner has at last in fact, and at least for the moment, obtained a *so-called* self-sufficient status, Petitioner was literally carried to that highly desirable status on the largess and bounty of the American people. For at least fourteen years, and more likely twenty, petitioner's survival and growth have been almost wholly dependent upon direct subsidies provided by the American taxpayer. No one can deny that without those subsidies petitioner would be non-existent today.

The obvious fact that obviously is not apparent to petitioner is that those subsidies were provided for the interim and ultimate benefit of the public interest. Petitioner has been nourished, fattened and sustained by the largess of the U. S. public through many years, each of which would otherwise have been a year of economic annihilation for petitioner, for the sole purpose of maintaining petitioner in the position where it could best serve the *public need,* whatever that need may be from time to time. The public need, not the carrier's selfish interest, has been, is and always will be the controlling determination. That is the sole purpose for which petitioner today exists, whether petitioner is today subsidized or not. And it is not up to petitioner to determine what that public need may be from time to time. That function has been lodged exclusively in the hands of the Civil Aeronautics Board, together with the instruments and power to give full force and effect to determinations made for the public benefit.

The public need, insofar as air transportation is concerned, has not yet crystallized into a fixed and inflexible pattern. In this stage of the development of an air transportation system the requirements of the public convenience and necessity are still being sounded and measured. The Board has not only the power to maintain a continuing examination and study of the public need but it has a direct obligation to do so. And it clearly has both the responsibility and power to see that the requirements of the

public convenience and necessity, as determined by the Board, from time to time, receive maximum satisfaction from the air transportation system of this country. It is the Board's job to determine those requirements and to mold and work and knead the air transport pattern into optimum conformity with such requirements.

Section 401(h) of the Act, authorizing the Board to take the initiative and, after notice and hearing, to alter, amend, modify or suspend any certificate, in whole or in part, if the public convenience and necessity so require, is an instrument of construction expressly designed for that purpose. It is an instrument without which the basic purposes and objectives of the Civil Aeronautics Act would be rendered a nullity.

Every air carrier accepts its certificate subject to the paramount interest of the public. It accepts it with full knowledge that its own private interests must be subservient to the needs of the public. It accepts an expressly limited, clearly qualified authority. Irrespective of whether or not it has laid claim to the subsidy benefits of the Act, the Federal Treasury stands behind it as a virtual guarantor of the carrier's survival. In return for this insurance policy and innumerable other protective benefits to which it is entitled under this developmental statute, the carrier assumes, among other things, the obligation to submit its services and its pattern to such adaptation as is required by the public convenience and necessity, as found by the Civil Aeronautics Board to exist. If the public interest is found to require a limited suspension of a carrier's services at certain points, then under the obligations which the carrier has assumed under this Act and under the limiting qualifications with which its certificate was granted and accepted by it, the carrier's private interests must yield to the overriding public interest.

That such a limited suspension can be undertaken under the provisions of Section 401(h) cannot really be seriously questioned. Petitioner itself has recognized the validity of

the suspension provision of Section 401(h), at least insofar as that section authorizes the issuance of a suspension order upon *petition* of the carrier suspended. As previously indicated, petitioner itself in 1949 petitioned the Board pursuant to Section 401(h) for a suspension of its service at the very points here involved, Yuma and El Centro. In the face of the clear and unambiguous language of Section 401(h) it is impossible to conceive that any serious consideration can be given to an argument that 401(h) authorizes suspension, but only when such suspension is sought by the carrier. The provision regarding suspension plainly states that the Board may order it "upon petition or complaint or *upon its own initiative*" (italics added).

The public interest may require suspension for any number of reasons. One of these may be the need for an experimental service of a different type performed by a different type of carrier serving a different type of market. It may also be required in the interests of strengthening the air route pattern by strengthening its constituent elements. These considerations were all present in this case. The route in question is sufficiently strong to constitute a strengthening of Bonanza's present route pattern. On the other hand, that part of it which is possessed by petitioner is weak compared to the rest of petitioner's system and hence constitutes a weakening element in petitioner's overall route structure. The type of service required by the communities in question and the willingness and ability of the two carriers (petitioner and Bonanza) to provide that service, considered, against the backdrop of the nature, character and experience of each carrier, were also important and proper considerations in weighing the question of the requirements of the public convenience and necessity.

It is clear under the Act that service which is required by the commerce, the Postal Service or the national defense may be certificated and continued at least on an experimental basis. The development of a system properly

adapted to the *"present and future"* needs of the nation, as well as the preservation and recognition of the "inherent advantages of air transportation" may, and often has been found to justify service that admittedly is not self-sufficient initially. That the framers of the Act understood conditions and foresaw the circumstances is obvious from a reading of the Act. The Board is expressly authorized to classify carriers from time to time in accordance with the nature of the service performed and the extent of that service (Section 416 (a)) and is authorized in the establishment of rates of compensation under section 406 (b) to take account of such classifications in determining the rate that shall be applied. There can be no doubt that the "need" of the carrier may well reflect to a large extent the nature of his services and the extent to which they are operated, and facts which authorize classifications of carriers under Section 416(a) are apposite under 406(b) in determining rates of compensation for mail service. Thus if the Board were to find that because of the nature of the service required, the public convenience and necessity required the service by a carrier of one class rather than by a carrier of another class, it would be perfectly justified in transferring for a limited period at least the authority to operate the service to the carrier in the suitable class, even though the cost to the government is greater. Cost is but one of the considerations entering into the question of public convenience and necessity.

The test in every case is the public convenience and necessity as defined in the Declaration of Policy in Section 2 of the Act, and not the interest of a particular carrier. If it were otherwise, the development of an air transportation properly adopted to our needs, present and future, would be seriously hampered, contrary to the intent of the Act, and the ultimate result would be to transfer outright the public utility regulatory functions from the Board where they were vested by Congress to the carriers for private gain. That such a result was ever intended is inconceivable.

It is clear therefore that whatever else may be said of the powers of the Civil Aeronautics Board, it was expressly given the authority to maintain the paramount public convenience and necessity according to the dictates of its requirements from time to time; and that its actions in the discharge of that authority are governed only by the express limitations contained in the Act on the one hand and the knowledge of and experience with the requirements of commerce, the Postal Service and the national defense on the other. Congress defined a broad area in which the Board was to function, and it expressly gave the Board authority to meet the changing needs of the public convenience and necessity. The dynamics of air transportation in 1938, the potential envisioned, and the policy declared by the framers preclude any belief that the Board was conceived in a legal strait-jacket that would inhibit the discharge of its future duties when the dictates of the public interest required further action looking to the existing and future needs of commerce, the Postal Service and the national defense.

2. The Board's order hereunder reviewed does not revoke Western's authority to serve Yuma and El Centro.

Petitioner contends that the Board's suspension order is tantamount to *revocation,* and that since a certificate may not be *revoked* except for intentional and continued violation of the law (Section 401 (h)) the action taken by the Board here is invalid.

Aside from the fact that such a contention flies in the face of the express language of the statute, it seeks to expand the scope of the issues in this proceeding far beyond what they actually are, and to lull the Court into deciding legal questions not here presented, in anticipation of events which *may* or *may not* come about. It is essential that the Court know what this case is *not.* It is *not* a revocation; it is *not* an amendment or a modification of a certificate; it is *not* a permanent suspension. Neither the legal basis for, nor the propriety of, any of those actions is therefore before the Court.

In their ordinary and most acceptable definitions, the terms of Section 401 (h) of the Act may be classified into two types of authorization. On the one hand, the introductory sentence to 401 (h) which gives the Board the power, *on its own initiative* to *alter, amend, modify* or *suspend* a certificate, in whole or in part, if the public convenience and necessity so require, establishes an *economic sanction*, to be employed *according to the requirements of the public interest.* The second part of that provision authorizes the Board to *revoke* a certificate, in whole or in part, for intentional and continued failure to obey the law: that provision is a *penal* function. Its intent and purpose is in no way a limitation on the Board's *economic* control power to alter, amend, modify or suspend in the public interest; the intent of the second part clearly is to deter violation of the law. One is clearly a *constructive* measure; the other a *destructive* measure. This has been the Board's interpretation of the Act from the very beginning, and it is the only defensible interpretation that may be given the two provisions. (See, *e.g., Caribbean Area Case,* 9 C.A.B 534, 545-554 (1941); *All American Airways, Inc., Suspension Case,* 10 C.A.B. 24, 27-28; *Frontier Renewal Case,* Docket No. 4340, Order Ser. No. E-5702, Sept. 14, 1951; *Wisconsin Renewal Case,* Docket No. 4387, Order Ser. No. E-5951, Dec. 13, 1951; *North Central Route Investigation,* Docket No. 4603 *et al.,* Order Ser. No. E-5952, Dec. 13, 1951.).

Petitioner concedes that the word "suspension" implies something temporary, i.e., not permanent. But his argument is simply that the Board suspension Order is not in fact a suspension but a revocation. This contention is based primarily on petitioner's position that certain statements and actions by the Board must be construed as showing that the Board's Order in question is intended to remove Western permanently from these two communities.

One such instance relied on is language in the Board opinion accompanying the Order under review, where the Board found that local air service for the Los Angeles-

Phoenix route was required by the public convenience and necessity, and that in view of the Board's well-established policies with respect to the selection of carriers to operate local service air routes and the Board's responsibilities for the encouragement and development of a self-sufficient and adequate air transportation system, Bonanza was selected as the carrier to be authorized to provide the required local service.

The Board then said that those were factors supporting its conclusion that "the transportation needs of El Centro and Yuma will, in the *long run,* be better served by a local carrier than by a trunk." (Italics supplied)

In terms of the perpetual life of a corporation it would be reasonable to conclude that a suspension of part of its activities for a period of five or six years or thereabout clearly would not be tantamount to a revocation. If the period of suspension is limited in time and the period is within the bounds of reason, the action is unquestionably temporary. Of course, if a suspension is extended and extended and extended, *ad infinitum,* it can eventually constitute revocation. But such is not the case here, and there is no reasonable likelihood that such a situation will ever arise.

Air transportation is far too fluid at this stage in its development to be susceptible to accurate forecasting. And certainly it is wholly improper to attempt to construe the purpose and effect of a current order in the light of something which may or may not ever come to pass in the future.

It is of course possible that the Board might some day take such action as would constitute revocation. When and if such an action is taken, petitioner will be fully entitled to challenge its validity. But not until such time does he have any standing to be heard. He cannot attack as invalid that which does not exist merely because he chooses to believe that ultimately it will.

Petitioner's fear or fancy as to what may ultimately evolve in this picture, based on language that *could* foretell some *future* action amounting to revocation, but may, in

fact, be wholly meaningless as the facts develop, can provide no proper basis for a construction of an order that is on its face clearly temporary.

Assuming for the sake of argument that the period of suspension in question is five years and that suspension for such a limited period could reasonably be considered temporary, the court must must full well realize that there are a number of different things that could transpire at the close of that period, any one of which would patently demonstrate that petitioner's argument of today is wholly unsound and unwarranted. Bearing in mind that air transportation will undoubtedly go through several more widely varied stages of development and progress before it begins to level off, it is not at all unlikely that Western itself some five years from now will find that service by it to Yuma and El Centro will be wholly incompatable with its then existing system. Western's principal profit-bearing routes are especially suitable for large, high-speed, high-altitude aircraft. That feature may very likely characterize its whole system five years hence.

It is also quite possible that in five years from now the traffic at Yuma and El Centro may be developed to the point where two different types of service by two different types of carrier would be warranted.

There is also the very distinct possibility that the Board in the light of circumstances then existing would determine that the cities in question should no longer be served by a local service carrier.

Nor is it impossible to imagine that within the span of five years Western could have, by merger, acquisition or otherwise, succeeded to the operating authority of the local service carrier in that area, rendering the question entirely moot, or that Western itself could have become merged into another carrier which would have no interest in serving Yuma and El Centro.

So it can readily be seen that a temporary suspension today does not in any sense foretell a revocation attempt

by the Board at some distant future date and certainly cannot be construed as a revocation *in futuro*.

The Board action on which petitioner relies most heavily, however, in support of its allegation that the suspension order is in fact a revocation order, is an order (E-6041) by the Board, issued on the same date as the order here under review, directing the institution of an investigation *to determine whether the integration of the routes of Southwest and Bonanza* (touching by virtue of the Board order here subject to review) *into a single unified route system* by means of merger, consolidation, acquisition of control, route transfer or in any other lawful manner *would be in the public interest* and in accordance with the public convenience and necessity as defined in Section 2 of the Act.

Viewed dispassionately this order is obviously no more than an *inquiry* "to determine whether the integration of the route . . . would [or would not] be in the public interest". Such a proceeding is in no sense definitive and cannot result in an order directing such an integration. The proceeding is merely exploratory, *not* adjudicatory. Whether or not a formal merger proceeding under Section 408 of the Act would spring from such an investigation would depend in part upon the evidence brought out in such a proceeding. And, if a formal merger proceeding were to be started subsequent to the close of the investigation, whether or not a merger proceeding would culminate in a merger certainly no one can say, unless, like Western, they are disposed to charge that the Board has in effect already pre-judged such a proceeding.

Moreover, and this should be of particular interest to the court, the Board has no statutory authority to order a merger. The Board's power with respect to mergers is derived from Section 408 of the Act, and is subject to the requirement that an *application* for merger, consolidation, acquisition of control, etc., must be submitted to the Board for approval, and a public hearing must be held thereon.

The Board's power in this respect does not therefore come into being until an applicaion is submitted for its approval. The statute does not confer any authority on the Board to initiate a merger proceeding. Thus, in effect, the Board has only a ratification power and a veto power with respect to mergers, consolidations, etc.

But in any event, *if* there were to be an adjudicatory merger proceeding, and *if* the Board were to approve a merger of Bonanza and Southwest, and *if* such order of approval were to be deemed effectively to constitute a revocation of Western's authority to serve Yuma and El Centro, Western's cause of action against the Board for unlawful revocation would arise at that time, but it plainly does not exist now. Such cause as it claims now is purely illusory; it is conjecture based upon surmise based upon supposition.

3. The Board, after notice and hearing, and upon its own initiative, has the unequivocal statutory power to suspend a so-called permanent certificate, in whole or in part, for a limited period of time if, as found in this case, the public convenience and necessity so require.

This case actually presents a narrow and simple legal question; it is this: Does the Board, upon a finding that the public convenience and necessity so require, have the power to *temporarily* suspend a certificate of public convenience and necessity which has been previously granted to the carrier for an indefinite period? That is the real legal issue here; reasons for and against suspension should not be confused with the legal issue, as such reasons are matters that are weighed in the balance in determining the requirements of the public convenience and necessity. Once these are found to require suspension, you then have the purely legal question concerning the *power* of the Board to suspend, in whole or in part, for a limited period of time an indefinite or so-called permanent certificate authority.

The public need in a particular area for another type service by another type carrier than presently afforded,

when the area in question will not currently warrant service by two carriers, can unquestionably be a proper basis for a finding that the public convenience and necessity require the limited suspension of the carrier then serving only a part of that area. This was not of course the sole basis for the Board's findings as to the requirements of the public convenience and necessity. But assuming for the moment, for the sake of argument, that it was, the legal question before the court is whether the Board has power to suspend *if* the public convenience and necessity are found to require suspension. But beyond that, and it clearly passes from the legal question to a question of the substantial evidence rule, would be whether or not a finding that the public convenience and necessity require suspension of petitioner's services at these two communities is supported by substantial evidence. This clearly involves the court's narrow and self-limited power to review such a determination, a power based on the "substantial evidence rule" (see, Netterville, *The Administrative Procedure Act: A Study in Interpretation,* 20 Geo. Wash. L. Rev. 1 (1951)).

It is obvious, however, from the Board's opinion and order in this case that the Board's finding that the public convenience and necessity require suspension of petitioner's services at Yuma and El Centro is based on a number of factors that enter into the Board's expert judgment as to the requirements of the public interest. Such factors include but are not limited to: (1) the fact that the new service to be authorized was of a local-service nature; (2) the Board's well-established policy that local service should be provided by so-called local service carriers specializing in and devoting all their attention to that type of service; (3) the route found to be required by the public convenience and necessity involved a number of points other than the two suspension cities of Yuma and El Centro; (4) the Yuma and El Centro traffic is presently insufficient to justify service by two carriers; (5) Yuma and El Centro were found to require a local-type service which could best be provided

by a local service carrier; (6) Western's history of operations at Yuma and El Centro showed a blatant disregard for their public interest obligations to those communities (see pages 56-59 incl. of Appendix "A" of Western's brief to this court) (7) Western's history of operations at Yuma and El Centro reflected a marked lack of interest in the development of traffic at those communities; (8) Western's show of renewed interest in providing proper service to those communities apparently stemmed from ulterior motives wholly unrelated to the needs of those communities and Western's obligation to meet those needs; (9) Western has represented to the Board that it cannot operate its San Diego-El Centro-Yuma segment on an economical basis unless it is granted an extension from Yuma to Phoenix; in connection with Western's present claim that it is *now* operating at Yuma and El Centro at a profit the court should bear in mind that the winter months are the *peak* traffic months in that area; that the question of whether a part of a much larger operation is profitable or not involves some highly intricate and very debatable matters such as the proper allocation of indirect costs or overhead; and that most domestic carriers are now experiencing substantial traffic increases directly attributable to the present tempo of the war economy, increases which may one day soon dissolve as suddenly as they came into being; (10) suspension of Western at these two points is in furtherance of the Board's efforts to strengthen the financial and operating structure of the trunk-lines by removing some of the small intermediate points that are marginal in terms of profit, and thereby generally extending the average length of haul and average length of flight, thus enabling the carriers to concentrate on the long-haul, high density traffic—the kind of traffic which their large, high speed, high altitude aircraft, are ideally suited to serve at a maximum economy and profit to the carrier; (11) the award to Bonanza will substantially improve that carrier's efficiency, economy and service; and (12) the suspension of Western and the award to Bonanza

will strengthen and improve the air transport pattern and service in the area in question.

The action here taken by the Board in ordering a temporary suspension of a certificate is, of any of its *authorized* powers, the furthest removed from revocation. The power to suspend is the lesser of the powers which the Board may exercise in the requirements of the public convenience and necessity; it may also alter, amend or modify. There is little likelihood that petitioner could successfully challenge even the exercise of those broader authorities which have inherent in them no such element of the temporary as does the term "suspension". The Board has properly considered suspension to connote a temporary action (See, *Caribbean Area Case, supra*) but alteration, amendment or modification have no such temporary connotation. Since the Act plainly authorizes those broader and more permanent powers, the restraint exercised by the Board in employing the lesser authority of suspension is indicative of the non-permanent nature of the action here taken.

The Board's power of suspension was clearly recognized by the President's Air Policy Commission and a more effective use of that power to enhance the careful development and planning of a sound national route pattern was strongly urged by the Commission. It urged a comprehensive survey by the Board and the development of a more cohesive policy, saying:

> "As part of such review, if the Board should find any routes no longer now required by public convenience and necessity, *it should use any present legal powers* such as *suspension* or reduction of 'need' payments *to reduce the effect of any errors in the present system.* This appears *preferable* to causing instability in the industry through granting to the Board the right of *outright revocation* of routes." (Italics added.) *Survival In the Air Age,* p. 111, January 1, 1948.

There is no real ambiguity in the language of Section 401 (h), but in order to demonstrate as conclusively as

possible to the Court the utter impropriety of petitioner's contention, reference may be made to prior case law under other Acts and the legislative history of the Civil Aeronautics Act, which clearly and unequivocally stand as a bulwark against petitioner's construction of the Act.

In essence, petitioner's contention is that the power to suspend a certificate in any respect or in any manner possessed by the Civil Aeronautics Board must be interpreted in accordance, *not* with the language of the Civil Aeronautics Act, but in accord with the provisions of the *Motor Carrier Act* which provides that no certificate may be suspended or revoked except 1) upon application of the holder, or 2) for intentional and continued violation of that Act. (Part II of the Interstate Commerce Act, 49 Stat. 543, as amended 54 Stat. 919, 49 U. S. C. 312 (1946). But under that Act, the I. C. C. has no authority to take action "on its own initiative" as the C.A.B. has under Section 401 (h) of the Civil Aeronautics Act; the I. C. C. has no authority to amend, alter, suspend or modify a certificate *except upon application from the holder.* In the absence of such an application, a certificate once issued is, with certain qualifications (see, *e.g., United States* v. *Rock Island Motor Transport Co.,* 340 U. S. 419 (1951); *United States* v. *Texas and Pacific Motor Transport Co.,* 340 U. S. 450 (1951)) inviolate except by revocation under the very terms of the statute.

Under the terms of the Water Carrier Act (Part III of the Interstate Commerce Act, 54 Stat. 929, 49 U. S. C. 901 *et seq.* (1946)) the I. C. C. has no power *whatsoever* to alter a certificate, and has *no power to revoke* a certificate on any ground so far as the statute reads. The United States Supreme Court expressly held that the I. C. C. could not *alter* a certificate granted under that Act *in the absence of statutory authority.* (*United States* v. *Seatrain Lines,* 329 U. S. 424 (1947)). But there is nothing in the *Seatrain* case apposite here. There was *simply no statutory authority* even for revocation of the water carrier certificate,

or for that matter, for any alteration whatsoever. The *Seatrain* case therefore stands for the proposition that the I. C. C. in the absence of *any* statutory authority, may not alter, amend, suspend or revoke the certificate of a water carrier under any circumstances known to date. But if we carry the development of the law on the subject one step further and examine the authority of the I. C. C. to alter or amend a certificate of a Motor Carrier, it is clear that even with statutory authority which on its face would appear to exclude any but penal action by the I. C. C., *a declared policy of Congress to preserve the inherent advantages* of motor transportation as against rail transportation, *plus a reservation clause in the certificate,* gave the I. C. C. the power to alter and amend a certificate *beyond* the express terms of the statute. (*United States* v. *Rock Island Motor Transit Co., supra.*) That case alone would be substantial authority for the Board's action here, both by reason of *the Congressional declaration of policy in Section 2 of the Civil Aeronautics Act and by reason of the Board's reservation clause contained in every certificate* which provides in essence that the privileges granted by the certificate "shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board." The *Rock Island* case was a 5 to 4 decision by the Court, and required that the Supreme Court find authority in such a reservation clause to make *substantial* alterations in the authority granted, even though there was *no express statutory authority* for such alterations. But this Court is not called upon to "stretch a point." The Civil Aeronautics Act of 1938 cured the short-comings of the Motor Carrier Act of 1935 and *expressly* gave the Board the power to amend, alter, modify or suspend a certificate whenever the requirements of the public convenience and necessity show the need for such action. Neither the Civil Aeronautics Board nor this Court need rely on any reservation clause in the certificates themselves. The "Achilles heel" in these

certificates exists by virtue of the statute under which they were conferred and they must yield to the prevailing requirements of the public convenience and necessity.

Not even some public *advantage* in the certificate as it exists is sufficient to hold back the I. C. C.'s authority to alter a certificate if otherwise necessary. In *I. C. C.* v. *Parker* (326 U.S. 60), upon which the Court relied in part in the *Rock Island* case, the Court said "If the Commission later determines that the balance of public convenience and necessity shifts through competition or otherwise, so that injury to the public from impairment of the inherent advantages [of motor transportation] . . . exceeds the advantage to the public . . . the Commission may correct the tendancy." (326 US 60, 71-72).

How much more appropriate this language under the Civil Aeronautics Act of 1938 which *expressly* authorizes the Board to suspend, alter, amend or modify certificates when the public convenience and necessity so require, and under which the preservation of the inherent advantages of air transportation, which is directly in issue here, is made a significant part of the public interest test. This is not a situation where "the law has spoke too softly to be heard" above the clamor of vested rights; its letter is clear, its intent manifest and its command compelling!

Insofar as counsel has been able to determine, there is no authority whatsoever for the contention of the petitioner that the Board is powerless to order this temporary suspension. The Civil Aeronautics Act of 1938 represents the most recent federal regulatory Act of its kind and is properly interpreted to embody many improvements over earlier statutes, under whose provisions regulatory shortcomings had become obvious by 1938. The experience of other regulatory bodies under statutes authorizing less flexible action was certainly in the mind of the framers as is shown later herein in the legislative history. In addition to experience under the three Parts of the Interstate Commerce Act already discussed, other federal statutes

show that Section 401 (h) of the Civil Aeronautics Act was a grant of a new regulatory feature since it granted to the Board not only the usual penal provisions in suspension and revocation, but gave the Board an economic sanction to apply according to the dictates of the public convenience and necessity. (Compare, Section 4 (e) of the Federal Alcohol Administration Act, 49 Stat. 978 (1935), 27 U. S. C. A. 204 (e) (Supp. 1946) which permits suspension or revocation only for violation; Section 6 of the Federal Power Act, 41 Stat. 1067 (1935) 16 U. S. C. A. 799 (1946) provides for suspension upon the "mutual agreement" of the government and the holder, and for revocation for violations; the Merchant Marine Act, 49 Stat. 1985 (1936), 46 U. S. C. A. 1101 (1946) contains no provision analogous to Section 401 (h). Most state laws provide for suspension for "good cause" and for revocation for intentional violation. See, *e.g.*, Ariz. Code Ann. tit. 66, 511 (1939); Tenn. Code Ann. 5501.1 (Williams 1934). Utah Code Ann. c. 76, art. 5, ss 33 (1943); Ohio Code Ann. 614-87 (Page 1946)).

Recourse to the legislative history is not actually required in this proceeding, since the language of the statute is free from ambiguity and its purpose and intent defined in terms that do not conflict. But even if the Court should have some question with regard to the intent of the framers of the Act in enacting Section 401 (h), reference to the legislative history shows conclusively that the action here taken by the Board was fully appreciated and intentionally authorized.

Air transportation in the United States, from its inception as a mode of transportation has been, as it were, at the breast of the United States government. Prior to 1926, little had been accomplished in aviation beyond the adventure of experimental service. In 1915, President Wilson established the National Advisory Committee for Aeronautics (38 Stat. 930 (1915), as amended 45 Stat. 1451 (1929), 52 Stat. 1027 (1938), 50 U. S. C. Supp. 151 (1938));

that Committee was charged with the duty of supervising, directing and conducting fundamental scientific research and experiment in aeronautics. In the Post Office Appropriation Bill for 1917, $50,000 was set aside for air mail service (53 Cong. Rec. 9624 (June 20, 1916)) but when eight routes were advertised for competitive bids, only one bid was received, and that rejected because the bidder could not give bond. (53 Cong. Rec. 2035 (Sept. 2, 1916)). In effect, commercial service did not really get under way until 1918, with the inauguration of the Washington to New York route by *army* flyers carrying the mail (83 Cong. Rec. 6629 (May 11, 1938)).

By 1925, it was believed that the air carrier industry had developed sufficiently to shift the service from the Post Office to private contractors, and in that year the Air Mail Act of 1925 (43 Stat. 805 (1925), 39 U. S. C. 461 (1928)) was passed. That Act gave the Postmaster the bare right to let contracts for carrying mail to private contractors, and authorized him to make rules and regulations necessary for such transportation. In 1928, the Air Mail Act of 1925 was amended to substitute *route certificates* of not over ten years duration in the nature of franchises for air mail services. (45 Stat. 594 (1928), 39 U. S. C. 465 (a) (1934)). Under a similar amendment known as the *Watres* Act, the Postmaster General was given broad economic authority over the carriers by regulating (1) route location, (2) route consolidations and extensions, (3) contract bidding conditions, (4) service standards, (5) equipment and personnel, (6) accounts, and (7) compensation, including losses from passenger traffic. (46 Stat. 259 (1930) 39 U. S. C. 464 (1934); See also, *Airmail: The Watres Act in Its Workings,* Aviation Magazine, March 1932).

This brief outline of events up to 1930 indicates the nature of the broad regulatory power vested in the Postmaster General, not only with respect to mail services, but with respect to the economic regulation of carriers under route certificates. By 1933, Congress believed that the

situation was out of hand, that too much money was being paid to support the air service, and an investigation was undertaken headed by Sen. Black from Alabama (now Associate Justice Black of the United States Supreme Court). (See, *Hearings on Investigation of Air Mail and Ocean Mail Contracts,* 73rd Cong., 2d Sess., pursuant to S. Res. 143 and S. Res. 349 (1934) *and House Report* No. 1956, 72nd Cong. 2d Sess. (1933); see also, Address by Senator Black delivered on nation-wide hook-up, reprinted 78th Cong. Rec. 2715 (Feb. 19, 1934)). Before that Committee had gone very far, the Postmaster issued a summary order *cancelling all domestic route certificates* as of February 19, 1934 (See, Fagg, *National Transportation Policy and Aviation,* 9 J. of Air L. 155 (1936); Fagg's article is an excellent review of Federal legislation past and prospective). Injunction proceedings by the carriers against this summary cancellation of their route certificates were wholly unsuccessful, and the summary action of the Postmaster upheld. (*Transcontinental and Western Air Inc.* v. *Farley,* 71 F. (2d) 287 (2d Cir., 1934). Under Executive Order by President Roosevelt, the army took over all operations (Fagg, *supra,* p. 169) and Congress passed a statute authorizing the necessary transfers of personnel, property and appropriations (Public L. 140, 73rd Cong. 2d Sess., Mar. 27, 1934).

The result of the Committee's investigation was the enactment of the Air Mail Act of 1934 (48 Stat. 933 (1934), 39 U. S. C. 463 (1934); see, *Some Implications of the Air Mail Act of 1934,* 47 Yale J. 465-9 (1934). At the same time, Senator McCarran, a member of the Black Committee, introduced the first of a long series of bills providing for an independent agency to regulate the economic and safety aspects of air transportation (see, S. 3187, 73rd Cong., 2d Sess. (1934)) but the bill was defeated.

The Air Mail Act of 1934 made the air carrier industry subject to federal regulation from three sources: the Post Office awarded contracts and determined schedules; the

I. C. C. fixed rates; and the Bureau of Air Commerce licensed aircraft and personnel and operated the airways and provided safety regulations. The Act also contained a provision for the appointment of a Federal Aviation Commission to make a study of the whole aviation problem and report back to Congress (See, *Report of the Federal Aviation Commission,* Sen. Doc. 15, 74th Cong., 1st sess. (1935)).

In 1935, Congress passed an amendment prohibiting "off-line" service if such service would in any way compete with the service available on an air mail route. (49 Stat. 619 (1935), 39 U. S. C. Supp. 469 (N) (1935). This amendment made expansion almost entirely dependent on air mail contracts and the industry was, for all practical purposes, frozen temporarily (see, *The Economic Regulation of Air Transport,* 5 U. Chi. L. Rev. 471.7 (1938)).

Between 1934 and 1938, the aviation industry was under the control of the Post Office, and its development wholly dependent upon grants from that branch. The plenary power in the Postmaster to issue a "death sentence" against a carrier, almost at will was never successfully challenged (see, *e.g., Boeing Air Transport* v. *Farley,* 75 F. 2d 765 (D. C. Cir. (1935) *cert. den.,* 294 U. S. 728 (1936); *Pacific Air Transport* v. *Farley,* decided with the Boeing case, *supra*; *Pennsylvania Airlines* v. *Farley,* 75 F. 2d 769 (D. C. Cir. 1935; Note, *Air Mail Cancellation of Contracts by the Postmaster General,* 6 Air L. Rev. 59 (1936)).

But during the period from 1934 to 1938, the entire matter was still being pursued by Congress in an attempt to achieve some sort of stability and to find procedures whereby a proper balance between government regulation and carrier freedom could be achieved. (A list of Bills considered by Congress during that period is contained in Appendix A of Rhyne, Civil Aeronautics Act Annotated (1939 189). In January 1935, the Federal Aviation Commission submitted its report with 102 recommendations based on its study (Sen. Doc. No. 15, 74th Cong. 1st Sess.

(1935)). That Commission recommended that "All regular domestic scheduled transport operations should require a certificate of convenience and necessity, to be issued by the Commission. . . . Such a certificate should not be cancelled except for good cause without equitable compensation to the holder." On the same day, Congressman Lea introduced a bill which embodied most of the recommendations of the Commission (H. B. 5174, 74th Cong., 1st Sess. (1935); see, Wigmore & Fagg, *An Explanation of the Lea Bill,* 6 J. Air L. 184 (1935)). But President Roosevelt objected to the creation of an independent authority with broad powers to regulate air commerce (see, Message of President Roosevelt which accompanied the *Report of the Federal Aviation Commission, supra.*) despite the favorable recommendations along those lines from the Commission. (The *Commission's report* had said: "The Commission so created should have broad supervisory and regulatory powers over civil aeronautics, and particularly over domestic and foreign transport." *Report, supra,* Sen. Doc. No. 15 at 243). Senator McCarran introduced a bill to carry out the *President's* recommendations (S. 3027, 74th Cong., 1st Sess. (1935), which was expressly patterned upon *existing* federal regulation of transportation. (See Rhyne, *supra,* at 44). That bill would have put the regulation of aviation under the I.C.C. with regulatory powers practically *identical* with those possessed by the Commission over motor carriers and water carriers (see Part II and III of the Interstate Commerce Act, 49 Stat. 548, as amended, 54 Stat. 919, 49 U. S. C. 312 (1946); 54 Stat. 929, 49 U. S. C. 901 (1946)). After hearings (See, *Hearings on S. 3027,* Before a Subcommittee of the Committee on Interstate Commerce, 74th Cong. 1st Sess. (1935)) the bill was rewritten and re-introduced as S. 3420, (74th Cong. 1st Sess. (1935)). The Committee Print of S. 3420, dated Aug. 29, 1935 has a caption which states:

> "This print . . . shows derivation and comparability of the various sections of this bill with the provisions

> of Motor Carrier Act, 1935, Interstate Commerce Act, . . . and bill for the regulation of waterways. . . . "

(See also, comparative print of S. 3027, 74th Cong. 1st Sess. 1935).

For our purpose here, the provisions of section 405 (m) of S. 3027 show the prevailing philosophy of the day induced by President Roosevelt's reaction to an independent commission with broad regulatory powers. That section, which is very similar to the component provision in the present Motor Carrier Act, provided:

> "Any certificate may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or upon the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply [with the law]"

A like provision, for all practical purposes is contained in H. R. 5234 (75th Cong. 1st Sess. (1937) section 305 (j). This provision was also patterned on the Motor Carrier Act (see, testimony of Commissioner Eastman, *Hearings on H. R. 5234,* Before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong. 1st Sess. (1937) at p. 41). By the end of 1937, the House and Senate had agreed for all practical purposes on legislation to regulate the economic phases of air transportation (See S. 2, 75th Cong. 1st Sess. (1937) and H. R. 5234, *supra.*). House Report No. 911 (75th Cong. 1st Sess. 1938)) said of the two versions:

> "The fundamental purpose of this proposed legislation is to extend to the Interstate Commerce Commission regulatory powers over air transportation, *generally similar* so far as applicable, *to the powers* it now exercises over rail and motor transportation." (Italics added).

Had Congress proceeded to adopt the legislation as proposed, and particularly as reflected in Sections 405 (m) of

H. R. 5234 and 305 (j) of S. 3027, the petitioner in this proceeding would be correct in asserting that the Board is without authority to suspend or alter a certificate except on application from the holder, and could not otherwise suspend or revoke except for knowing and willful violation of the law. But the plain fact is Congress did *not* adopt any of the legislation so proposed. President Roosevelt then appointed an Interdepartmental Committee to review the whole picture and to make necessary recommendations with respect to *who* should regulate aviation, and *what powers they should be given in order to establish and maintain a sound* air transportation system. (See *Hearings on H. R. 9738,* Before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong. 3rd Sess (1938)). That Interdepartmental Committee was composed of representatives of six executive agencies, and took voluminous testimony of all interested parties both in government and industry. But the I. C. C. was not appointed to the Committee, and "was intended to have its feathers plucked" (See remarks of Rep. Withrow, 83 Cong. Rec. 6505 (May 9, 1938). While Congress was not in session during the late summer and early fall of 1937, this Committee undertook its long and extensive hearings for the revision of the bills. President Roosevelt at about the same time revised his views and announced that he *favored* an *independent authority, with broad powers to regulate the industry* (83 Cong. Rec. 6628 (May 11, 1938).

All this study, revision, reorganization and the like resulted in H. R. 9738 (75th Cong. 3rd Sess. (1938)), in which Congressman Lea embodied the recommendations of the Interdepartmental Committee. (See, *Hearings on H. R. 9738, supra.*) Mr. Hester, Ass't. General Counsel of the Treasury and Fred D. Fagg, Director of Air Commerce appeared and testified with respect to the work of the Interdepartmental Committee. No official record of the Interdepartmental Committee's work is available, but

this bill, Mr. Hester said, "embodied the unanimous recommendations of the six executive departments. . . . " (Id. at p. 2)

Thus after a complete restudy of the legislation previously proposed, and in the light of the new philosophy that had taken hold that aviation should be under *a newly created and independent authority with broad regulatory powers,* H. R. 9738 was drafted to reflect the new philosophy (*Hearings on H. R. 9738, supra.*). A comparison of *Section 402 (k)* of this new legislation with *Section 405 (m)* of the earlier versions in S. 3027 shows conclusively the intention to arm the new authority with *power to supervise on a continuing basis,* where the I. C. C. was empowered with no such authority. Section 402 (k) of the 1938 revisions reads as follows:

> "The Authority upon petition or complaint or *upon its own initiative* after notice and hearing, *may alter, amend, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require,* or may revoke any such certificate, in whole or in part, for intentional failure to comply with [the law]"

Thus, where the I.C.C. under the earlier versions would have had power to alter or amend *only upon application of the holder, the new Authority was empowered to act "on its own initiative" when the public convenience and necessity required such a change.* The power to revoke only for knowing and willful violation of the law remained the same. This marked change in the language makes it obvious that the provisions permitting action by the Board to protect the public convenience and necessity irrespective of carrier will or carrier violations were intentionally drafted as they now read. The same is apparent from House Report No. 2254 (75th Cong. 3rd Sess. (1938)). That report says that the purpose of the legislation was to create an independent agency and "to authorize the new agency to perform *certain new regulatory functions* which are designed to stabilize the . . . industry." (*Id.,* p. 1).

Other revisions of the bill were proposed in both Houses of Congress (See, Rhyne, *supra,* at p. 54 et seq.) but the provisions of Section 402 (k) of H. B. 9738 remained substantially unchanged except to add the power to *modify* (again showing the deliberate care given this particular provision), and the bill so read as finally adopted by Congress. (Public L. 706, 75th Cong. Ch. 601, 3rd Sess., 52 Stat. 973 (1938) 49 U. S. C. 401 *et seq.* (1946)).

With respect to the broader power given the new authority Rhyne has said:

> "While the economic provisions of the Act are admittedly modelled upon the ideas already enacted into law in various provisions of the Interstate Commerce Act, the wording and draftsmanship of the Civil Aeronautics Act of 1938 represents a vast improvement upon that of the provisions of the Interstate Commerce Act. If the suggested revision in the Interstate Commerce Commission . . ., based upon the experience under the Civil Aeronautics Act, comes to pass, it might be well to revise the wording of certain of the regulatory provisions of the Interstate Commerce Act." (*Id.* at 95)

(See also, Hester, *The Civil Aeronautics Act of 1938,* 9 J. Air L. 451 (1938)). And even under the earlier proposals for economic regulation over air carriers, Commissioner Eastman of the I. C. C. had said:

> "The declaration of policy also makes it clear that we must be guided in our regulation by the peculiar conditions of air transportation, rather than by conditions in other forms of transportation."

(See, *Hearings on S. 3027, supra,* at p. 37). Mr. Edgar S. Gorrell, President of the Air Transport Association whose membership consisted of almost every airline in the country, testified before the same Committee that,

> "We realize that our industry is, peculiarly, one affected with the public interest. No other is so inti-

mately bound up with the demands of our national Government both in peace and in war time." (*Id.* at 53)

Further evidence of the change wrought in the Interdepartmental Committee with regard to the regulatory powers to be given the new commission is seen in the revision of the earlier proposals with respect to grandfather rights. The previous proposals would have made the granting of a certificate to any carrier operating prior to the adoption of the Act mandatory upon the I. C. C. (See, *e.g.,* S. 3027, *supra.*). But as proposed and as finally adopted after the Interdepartmental Committee study, grandfather certificates were not mandatory, and the Act expressly gives the Board the power to *deny or alter* prior existing routes if "the service rendered by such applicant . . . was inadequate and inefficient" (Section 401 (e) of the Civil Aeronautics Act; see, *Hearings on H. R. 9738, supra,* at p. 39). Thus, even with rerpect to *prior existing rights,* the Board was empowered to correct inadequacy or inefficiency. Section 401 (h) carries over that power, among others, into future proceedings in order that the Board might supervise, on a continuing basis, the operations under a certificate so as to insure that the public convenience and necessity, as defined in Section 2 of the Act, is protected.

Further evidence of the authority to supervise on a continuing basis even the rights held before the Board was established is seen in Section 1108 of the Act as adopted. Under that section, "All orders . . ., permits, contracts, *certificates, licenses,* and privileges . . . issued [before the Act] shall continue in effect until *modified, terminated, superseded, set aside* or repealed by the Board . . . "

Needless to say, certificates of public convenience and necessity granted under Title IV of the Act were intended to give stability to the carriers, but that aim is subordinate to the intent to protect the paramount public interest in the development of an air transportation system properly adapted to the declaration of policy in Section 2 of the Act.

(See, *Hearings on H. B. 5234, supra,* at p. 66 *et seq.*) It was certainly never understood, by the industry, which had been used to summary action by the Postmaster General, that route certificates were to be regarded as wholly inviolate. As a matter of fact when some question arose as to the permanence of certificates, Mr. C. R. Smith, President of American Airlines, testified that certificates of *unlimited duration* were preferable from the *attractiveness* to investor standpoint, but should be, he thought, subject to *suspension for cause.* "There would be no occasion," he said, "to issue a certificate for a limited time *as long as the Commission is given authority to cancel it.*" (*Hearings on S. 3027, supra,* at p. 50.). And Mr. Gorrell, testifying on H. R. 5234 (*supra,* at p. 68) said:

> "We should proceed a step at a time, giving *both public administration and private management* an opportunity to learn new lessons and *to un-learn old ones* that may prove false." (Italics added.)

The Civil Aeronautics Act of 1938, as finally adopted, had inherent in it these philosophies. The Board may grant a certificate for an unlimited period under 401 (d) (1) or for a temporary period under 401 (d) (2), but whether the certificate is granted for an unlimited period or for a temporary period, Section 401 (g) provides that unlimited certificates shall remain in effect until "suspended or revoked as hereinafter provided," *and* in the case of temporary certificates issued under 401 (d) (2) those certificates too shall remain in force and effect until the date specified therein, "unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein . . . " Thus 401 (g) negates any belief that certificates issued for an unlimited period may not be suspended; it expressly distinguishes between unlimited certificates and temporary certificates, and makes *both* subject to suspension.

The Act, its legislative history, and its obvious intent and purpose show conclusively that the Board has a continuing

power of supervision and may act to alter a certificate whenever the public convenience and necessity so requires. In this respect it was no accident that the Act is broader than the power given the I. C. C. under the Interstate Commerce Act. The Board was armed with authority to "un-learn" its errors and to act in accordance with the requirements of the public convenience and necessity as those requirements through experience manifest themselves from time to time. To deny the Board that power is to turn back the clock to a restrictive philosophy which was expressly and intentionally replaced by Congress, and to "un-learn" all the experience Congress had under the provisions of the Interstate Commerce Act. For example, the Ass't. Secretary of Commerce, commenting on Section 305 (j) of H. R. 5234 said that to permit certificates to be inviolate except for "willful violation" would "clearly serve to place an undue burden on the Government."; (See, *Hearings on H. R. 5234, supra*) and his fear did not go unheeded; the revisions as reflected in the present Act remove that element when the public convenience and necessity require the action, but admits it when the carrier is charged with violations. The "good cause" for suspension is the public convenience and necessity.

There can be no doubt therefore, that Congress established a dual standard for control over certificates. It gave the Board an *economic sanction* to be employed when the public convenience and necessity required a change and it gave the Board a penal sanction in revocation when the carrier intentionally violated the laws. It permitted the Board to act constructively in the future to achieve through administrative flexibility the high purposes of the Act. (See, Landis, The Administrative Process, 69, 78 (1938)). To read the Act otherwise does violence to its purposes and intent, and makes a nullity of its express provisions.

4. The affirmance by this Court of the Board's order of suspension will not be conducive to instability in the air transportation industry.

It is probably true that there may be a few timorous souls whose faith in the stability of air transportation would be seriously shaken by the knowledge that the Board has power to suspend Western at Yuma and El Centro if the public convenience and necessity so require. Their lack of faith assumes, of course, that the Board acts arbitrarily, and without cause or justification. If such an assumption were to be so accredited as to justify a denial of this power to the Board, then it would provide equally sound basis for stripping the Board of *all power* having any bearing on the industry's welfare or the public interest. For the Board has numerous powers which if seriously abused could have disastrous effects on the industry and public. But the existence of a power is not to be denied merely because it is susceptible to abuse. *All* power is susceptible to abuse!

Actually, if any assumption at all is to be made, it must be an assumption that the Board is a responsible agency.

Western argues that if the Board can suspend it at Yuma and El Centro it can also suspend it at Los Angeles, for example. And so it can, if the public convenience and necessity so require. Needless to say, however, Western would have no difficulty in showing that the public convenience and necessity require its retention in Los Angeles. So neither Western nor its present and prospective investors have any basis for concern on this score. Western attempts to support its argument by hypothesizing a case of flagrant abuse of power. The answer of course is that any lawful power can be abused. It is nonetheless a lawful power when properly exercised. The courts, of course, are the bulwark against such abuse of power.

In any event, however, the clear language of the statute, granting to the Board the power of suspension, and in other provisions the power of life and death over a carrier,

has been facing the industry and the investing public since 1938 when the Act was passed. Prior to that time, as the industry knows, and has heretofore been shown, survival in the aviation industry was indeed subject to whim and caprice and the ravages of almost wholly uncontrolled economic forces. Protection against such destructive elements as these represents the cardinal contribution of Congress toward the stability of the air transportation industry.

It should be borne in mind, too, that if in a given case it had been established that a *given action* would seriously prejudice the stability of the industry, then that fact alone would weigh very heavily in the determination as to whether or not, in that particular case, the public convenience and necessity required suspension. A proposed suspension of Western at Los Angeles would no doubt present such a question. The suspension at Yuma and El Centro certainly does not!

5. Petitioner has not been deprived of its property without just compensation in violation of the Fifth Amendment of the Constitution.

In the first place the statute (Section 401) which authorizes the granting of a certificate (401 (d) (1)), contains the express reservation that "no certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility" (Section 401 (i)). A certificate is accepted subject to this condition.

It is elementary that a license, which is a privilege, can be withdrawn without holding the licensee harmless from any financial injury that he may suffer.

In many instances licenses can be withdrawn without cause, and without compensation for losses incurred as a result.

A license withdrawn for *good cause* rarely ever entitles the licensee to compensation therefor. Where, as here, there is good cause (the public convenience and necessity) and

the license has been granted and received subject to an express condition that it confers no property or proprietary rights, a claim that the licensee is entitled to just compensation is wholly unsound.

The *Report of the Federal Aviation Commission* (Sen. Doc. No. 15, 74th Cong., 1st Session (1935)) recommended that certificates granted "should not be cancelled *except* for good cause without equitable compensation to the holder." (Italics added). But Congress went even farther in the Civil Aeronautics Act by insuring against *any* cancellation, without good cause, thus rendering the question of compensation wholly immaterial.

In considering the equitable side of the matter it should not be overlooked that for fourteen years Petitioner has not only had its losses underwritten by the Government but has also been paid by the Government a return of better than seven percent on its recognized investment (*after taxes*). Moreover, a part of petitioner's expenses which were recovered back from the Government include petitioner's depreciation charges against its ground and flight equipment since 1938; petitioner has in effect, therefore, recovered back its investment, at the expense of the Government.

For a carrier, whose profits and very existence for over fourteen years have been provided for by the Government, to now talk about just compensation seems unconscionable in the extreme.

Also it might be noted that Bonanza stands ready and willing to purchase petitioner's ground facilities at Yuma and El Centro, so that receipt of just compensation for its investment at those stations actually lies entirely within the discretion of petitioner.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Board's Order here under review should be affirmed forthwith.

Washington, D. C., March 29, 1952.

Respectfully submitted,

G. Robert Henry,
Attorney for Bonanza Air Lines, Inc.

Certificate of Service

I certify that on this date, as attorney for Bonanza Air Lines, Inc., intervener herein, I will have caused the foregoing brief of Bonanza to be served upon the attorneys for The Civil Aeronautics Board, Western Airlines, Inc., and Southwest Airways Company, by mailing three copies to each, properly addressed with postage prepaid.

G. Robert Henry,
Attorney for Bonanza Air Lines, Inc.

Washington, D. C.,
March 29, 1952.

APPENDIX "A."

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Served: Jan. 17, 1952.

Docket No. 2018 *et al.*

Reopened Additional California-Nevada Service Case.

Decided: January 17, 1952.

Certificate of public convenience and necessity on Bonanza Air Lines, Inc., for route No. 105 amended to authorize service, with certain limitations, between the coterminal points Los Angeles and Long Beach, Calif., and Phoenix, Ariz., via the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma and Ajo, Ariz., and Blythe, Calif.

Certificate of public convenience and necessity of Western Air Lines, Inc., for route No. 13 temporarily suspended, insofar as it authorizes service to El Centro, Calif., and Yuma, Ariz.

Certificate of public convenience and necessity of Frontier Airlines, Inc., for route No. 93 temporarily suspended, insofar as it authorizes service on segment 1 between Yuma and Phoeniz via Ajo, Ariz.

Western's authority to serve San Bernardino and Palm Springs, Calif., not suspended.

Except, as otherwise above indicated, applications for additional local air service in California and Arizona denied.

Appearances:

E. W. Jennes, Paul D. Lagomareini, and *Howard C. Westwood* for American Airlines, Inc.

Alexander C. Dick, G. Robert Henry, and *Frank W. Beer* for Bonzana Airlines, Inc.

Harry A. Bowen and *Emil N. Levin* for Frontier Airlines, Inc.

Martin J. Burke and *W. Clifton Stone* for Los Angeles Airways, Inc.

Walter Roche, C. Edward Leasure and *H. F. Scheurer, Jr.,* for Southwest Airways Company.

James K. Crimins and *Henry P. Bevins* for TransWorld Airlines, Inc.

Floyd M. Rett, John T. Lorch and *James Francis Reilly* for United Air Lines, Inc.

D. P. Renda and *Donald K. Hall* for Western Air Lines, Inc.

James D. Murphy for the State of Arizona Corporation Commission and Greater Arizona, Inc.

Robert N. Berlin and *Chester K. Hendricks* for the city of Banning, Calif.

Edward A. Mass for the Beaumont Chamber of Commerce.

Wayne H. Fisher and *W. M. Balsz* for the city of Blythe.

Seraphim B. Perreault for the Brawley Chamber of Commerce.

Perry Perreaut for the city of Brawley, Calif.

W. G. Duflock for the city of El Centro and the El Centro Chamber of Commerce.

Alexander W. Staples for the city of Indio.

Russell W. Ring for the city of Palm Springs.

Roy D. Boles for the city of Ontario.

Eugene Best for the city of Riverside.

T. T. Hannah for the county of Riverside.

A. W. Walker for the county of San Bernardino.

Harold G. Lord for the city of San Bernardino.

George Kerrigan for the city of San Diego.

John B. Wisely, Jr., and *Harold C. Giss* for the city and county of Yuma.

Julian T. Cromelin and *Frank J. Delany* for the Post Office Department.

Ronald H. Cohen and *Ernest Nash,* Public Counsel.

Dean E. Howell for the County of San Diego.

John T. Kimball for the Phoenix Chamber of Commerce.

Nicholas Udall for the city of Phoenix.

John B. Lydick for the County of Imperial.

John H. L. Bate for the Harbor Commission—Port of San Diego.

Opinion.

By The Board:

In this proceeding, we are once again presented with the question of the local air service needs of the Los Angeles-San Diego-Phoenix area.[1]

A public hearing was held before Examiner F. Merritt Ruhlen, and his report was served on the parties on August 17, 1951. The Report recommended, *inter alia,* that local air service be provided between San Diego and Phoenix via El Centro, Yuma, and Ajo, and that Western Air Lines, Inc. (Western), rather than either of the local service applicants, Southwest Airways Co. (Southwest), or Bonanza Air Lines, Inc. (Bonanza), be selected to render the service. The Examiner found that local service between Los Angeles and San Diego via Santa Ana-Laguna Beach and Oceanside, and between Los Angeles and Phoenix via San Bernardino, Palm Springs, or to any of the other cities for which application for such service was made is *not* required. The Examiner also recommended the suspension of Frontier Airlines, Inc.'s (Frontier), authority to serve Yuma-Ajo-Phoenix, and Western's authority to operate flights between San Bernardino or Palm Springs on the one hand, and El Centro-Yuma on the other.

Exceptions to the Examiner's Report were filed by Southwest, Bonanza, Frontier, United Air Lines, Inc. (United), and Western, and except for United which called attention to its brief before the Examiner, each of the foregoing parties filed briefs in support of their exceptions. The aforementioned parties and certain civic intervenors also appeared in oral argument before the Board.

Attached hereto as an Appendix are portions of the Examiner's Report containing the findings, cvonclusions, and recommendations with which we agree, and adopt as our own. We shall discuss herein principally those matters on which we have reached a conclusion different from that recommended in the Report, and those contentions of the parties wich warrant furter expression of our views.

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[1] See Appendix. pp. 1-3, for a statement of our previous consideration of this matter.

Los Angeles, Santa Ana-Laguna Beach, Oceanside, San Diego Service.

In a supplemental decision in the original *California-Nevada Service Case,* we found a need for local air service to Santa Ana-Laguna Beach, Oceanside, and San Diego as part of a Los Angeles-Phoenix route as well as a need for locl air service to El Centro, Yuma, and Ajo.[2] We have carefully considered the record in this, the reopened proceeding, and find no basis therein for changing our original conclusion as to the need for a local Los Angeles-San Diego service as part of a Los Angeles-Phoenix local service route.

As we previously noted, because the area around Los Angeles is heavily built up and traffic congestion is increasing, travel by automobile from Santa Ana or Laguna Beach to the Los Angeles and Long Beach municipal airports is comparatively slow. Air service to these two communities would make convenient transportation available to the north and east through trunkline connections at either Los Angeles or San Diego. As for Oceanside, it is not within convenient driving distance of either Santa Ana or San Diego, and its economic strength, plus its location near the Pendleton marine base, indicate that it would benefit from local air service.

Moreover, if the local service route between Phoenix and San Diego is not extended to Los Angeles, a considerable amount of the local traffic will be inconvenienced. There is no question that for the cities east of San Diego, such as El Centro, Yuma, Ajo, and Blythe,[3] Los Angeles is the western point of greatest traffic attraction. Terminating the San Diego-Phoenix local service route short of Lon Angeles would inhibit the full development of the local service traffic potential since the relative time and service advantage of air transportation over surface transportation for the relatively short distances here involved would be watered down by the necessity of using a connecting service.

If, as we have found, Los Angeles is the appropriate terminal for the local service route east of San Diego to be certificated herein, the additional certification of local service stops between San Diego and Los Angeles appears to be in the public interest since the added cost of this local service experiment between these points would consist pri-

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[2] *Additional California-Nevada Service Case, Los Angeles-San Diego-Phoenix,* 11 C.A.B. 39, 40-45.

[3] See pages 4-6, *infra.*

marily of the added station expenses.[4] Moreover, the addition of two intermediate points between San Diego and Los Angeles is desirable to discourage the carrier from competing for terminal-to-terminal traffic between Los Angeles and San Diego. We concur in the Examiner's conclusion that additional Los Angeles-San Diego terminal-to-terminal service does not appear required by the public convenience and necessity. We recognize that some terminal-to-terminal traffic will fly on the local service carrier's aircraft. However, we feel that the amount of diversion from the nonstop trunk services currently certificated between these points that will result from a local air service in smaller, slower aircraft should not be substantial.

We have considered also the effect of our decision on Los Angeles Airways' authority to operate a local service route with rotary-wing aircraft in the Los Angeles area which would, of course, be duplicated in part by the Santa Ana-Laguna Beach-Los Angeles segment here found to be required by the public convenience and necessity. However, the date on which Los Angeles Airways will inaugurate passenger service between these points is still in the indefinite future, and the extent of public acceptance of transportation by rotary-wing aircraft is still unknown. In any case, we believe that the amount of diversion of Los Angeles' traffic would be negligible.

With respect to Oceanside, the principal contention adverse to its certification is that the only suitable airport, that at the Pendleton marine base, is not available for civilian use. While the record is inconclusive as to the availability of this airport, we note that other military airports in the same section of the country are being used by civil air carriers, and it is reasonable to expect that similar arrangements could be made in this case, especially where the inauguration of such service would be a substantial convenience to the military personnel stationed there.

Local air Service to Blythe, Calif.

The Examiner's Report recommended against the inauguration of a local service experiment to the city of Blythe, Calif., although recognizing that the community is a rela-

[4] Some additional flight costs are also involved since it is relatively more expensive to land or take off an aircraft at a point than to overfly it, but these costs are not substantial.

tively isolated one. However, the Report did not consider the possible inclusion of the point on the San Diego-Phoenix local service segment but only on a Los Angeles-Phoenix route via Palm Springs and San Bernardino, a segment which was not found to be required by the public convenience and necessity, a conclusion with which we do not quarrel.

On the other hand, we have considered the possible inclusion of Blythe on the local service route between San Diego and Phoenix, and have determined that the inauguration of air service to Blythe on that route is required by the public convenience and necessity.

Blythe is located 238 miles southeast of Los Angeles, 156 miles northwest of Phoenix, and about 65 miles northwest of Yuma. Its 1950 population was 4,086 representing a 73.5% increase over its 1940 population. In the immediate surrounding territory there are an additional 6,000 people, making a total of about 10,000 persons living in this community. It is primarily an agricultural community in an area of considerable agricultural wealth. In addition, it has some manufacturing including one of the largest gypsum plants in the United States.

Blythe's primary communities of interest are with Los Angeles and Phoenix. In a representative 30-day period in 1950, it is estimated that over 7,000 persons from Los Angeles were registered in Blythe hotels, and over 1,000 from Phoenix. A secondary community of interest is similarly indicated with San Diego and Yuma.

There is no passenger rail service available at Blythe. Bus transportation, which is available, takes 4 hours to Phoenix and about 6 to 7 hours to Los Angeles. Among other testimony as to relative inconvenience of current mail service, there is evidence in the record that mail deposited in the morning at Blythe frequently is not delivered in Los Angeles until 48 hours later.

Blythe could be served by air between Yuma and Phoenix as an alternate intermediate point to Ajo, in which case the additional costs of inaugurating a local air service experiment to the point would consist principally of the added station costs, and flight costs for an additional 35 miles between Yuma and Phoenix for the added circuity of such route over a flight between such points via Ajo.

Based upon the foregoing considerations and all the facts of record, we find that the public convenience and

necessity require the provision of a local air service between the coterminal points Los Angeles and Long Beach, Calif., and the terminal point Phoenix, Ariz., via Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma and Ajo, Ariz., and Blythe, Calif., with Blythe and Ajo being served on alternate flights.

Selection of Carrier.

As previously noted, the Board in its original decision herein awarded the above route (with the exception of Blythe) to Southwest [5] (11 C.A.B. 39). However, prior to the date upon which the award would have become effective, the Board, after consideration of petitions for rehearing, reargument, and reconsideration filed by several parties to the proceeding, alleging, *inter alia*, that the Board's award to Southwest was, in part, outside the issues in the proceeding and could not be supported by the record therein, vacated such award.[6] The order set Southwest's application down for further hearing, permitted such application to be amended to place squarely in issue a Los Angeles-Phoenix local air service via San Diego, and consolidated into the reopened proceeding those parts of its previous decision as related to suspending portions of Western's and Arizona's (Frontier's predecessor) routes conflicting with a possible Los Angeles-San Diego-Phoenix local service route.

Southwest argues that this order was legally deficient insofar as it purported to rescind the route awarded to Southwest. It is the carrier's position that, under the provisions of section 401(g) of the Act,[7] a certificate once issued to a carrier may not be rescinded even *prior* to the date upon which it is to become effective except upon compliance with the requirements of section 401(h) of the Act; to-wit, after notice and hearing, and upon a showing of wilful fail-

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[5] The choice of carrier was between Western, a trunk carrier, and Southwest, a local service carrier, since Bonanza was not then a party to the proceeding.

[6] In Docket No. 2899, which was consolidated into this proceeding, Southwest had applied for a route extension from Los Angeles to San Diego, and from Los Angeles to Phoenix via various intermediate points. Southwest, however, had not specifically applied for a Los Angeles-Phoenix route via San Diego.

[7] As noted by the carrier, section 401(g) provides in part that "each certificate shall be effective from the date specified therein and shall continue in effect until suspended or revoked as hereinafter provided."

ure to comply with a requirement of the Act, an applicable regulation, or a certificate condition, which after having been called to the carrier's attention was not corrected. We must reject this contention. Southwest was clearly on notice that the original award was subject to reconsideration and we are satisfied that the Board's action in reopening the proceeding was proper.[8] Our attention has not been directed to any contrary authority. We, therefore, do not feel inhibited in selecting a carrier by our previous decision to award a substantially similar route to Southwest.

Before proceeding further with our opinion as to the carrier to be designated, there is one additional point to be made. The Examiner noted, and we agree, that the selection of a carrier to render the local air service between San Diego and Phoenix necessarily involves the question of suspension of Western's authority at El Centro and Yuma, and Frontier's authority over its Yuma-Ajo-Phoenix segment since there is insufficient traffic potential at any of these points to justify service by more than a single carrier. Western seeks to inhibit our ability to select a carrier other than itself by challenging our authority to compel a certificated carrier to suspend service to a point for reasons other than misuser or default. We have on other occasions met similar challenges to our authority with a full expression of our views as to our power to so act.[9] We are not here presented with any new arguments which warrant further discussion.

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[8] The certificate "issued" to Southwest which was attached to the Board's order (Serial No. E-3727, dated December 19, 1949) stated on its face: "This certificate, as amended, shall be effective on February 17, 1950: Provided, however, That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of December 19, 1949 (Serial No. E-3727), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time." (See 11 C.A.B. 39, 50-51). The effective date of this certificate was extended to March 31, 1950 by Orders Serial Nos. E 3869 and E-3935, dated Feb. 2, 1950 and Feb. 24, 1950, respectively. Since the opinion in the *Kansas City-Memphis-Florida Case, Supplemental Opinion*, 9 C.A.B. 401 (1948), such a clause has been specifically inserted in each certificate to take care of situations such as this where the Board might reconsider and rescind the authorization granted in the original opinion. See 9 C.A.B. 401, 408.

[9] *North Central Route Investigation*, Docket No. 4603 *et al.*, Order Serial No. E-5952, adopted December 13, 1951; *Wisconsin Central Renewal Case*, Docket No. 4387 *et al.*, Order Serial No. E-5951, adopted December 13, 1951; *Frontier Renewal Case* Docket No. 4340 *et al.* Order Serial No. E-5702 adopted September 14, 1951; *All American Airways, Inc., Suspension Case*, 10 C.A.B. 24, 27-28; *Caribbean Area Case*, 9 C.A.B. 534, 545-554.

As between choosing Western or one of the two local service carrier applicants, a decision is not difficult to reach. The considerations involved in our well-established policy favoring the award of local service routes to local service operators rather than trunk operators are squarely applicable here.[10] And on previous occasions we have applied this policy where Western was an applicant for a local service route,[11] and we are not here presented with any substantial change of circumstances or any new reasons justifying a different conclusion. Moreover, the history of Western's service to El Centro and Yuma [12] is such as to warrant an adverse conclusion as to Western's willingness to operate a truly local service route.

Even though Western could operate the local air service we find required by the public convenience and necessity, at a lower cost to the government, we may not permit that fact to be decisive. For if relative cost were the dominant criterion for the award of a new local air service, it would put an end to our policy of favoring independent local service carriers to operate local service routes.

Similarly, the conclusion that Western can offer more through service to the communities on the local service route than either of the other applicants does not especially buttress its case since it would be the rare instance where a trunk with its greater route mileage and number of communities served would not offer a through service to more traffic than would a feeder applicant for the same route. Thus, if this factor were to be considered decisive, the trunk applicant would ordinarily succeed to a local service route rather than the local service carrier applicant most qualified to render the local air service.

For these reasons, we conclude that one of the local service carrier applicants for the route should be preferred to

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[10] See, for example, *Rocky Mountain States Air Service*, 6 C.A.B. 695, 730-31 (1946); *West Coast Case*, 6 C.A.B. 961, 981 (1946); *New England Case*, 7 C.A.B. 27, 39 (1946); *Texas-Oklahoma Case*, 7 C.A.B. 481, 502 (1946). The award of local service route No. 106 to Mid-Continent Airlines, Inc. occurred under exceptional circumstances and was not intended to be a departure from our basic policy. See *Parks Investigation Case*, Order Serial No. E-4472, dated July 28, 1950, p. 22; also *North Central Route Investigation Case*, Order Serial No. E-5952, dated December 13, 1951, pp. 4-5.

[11] *Rocky Mountain States Case, supra*, p. 733; *Additional California-Nevada Service Case, Supplemental Opinion*, 11 C.A.B. 39, 41-42.

[12] See Appendix, pp. 22-24.

Western.[13] A more difficult choice is presented with respect to selecting one of the latter applicants. No one has seriously contested Southwest's or Bonanza's fitness, willingness, and ability to conduct the required local air service, and we find that both meet the required statutory standard for the award of a route extension.

We have carefully considered the record in this proceeding in the light of the contentions of these applicants as to their relative ability to generate traffic and serve a local air service route and can find little in this regard to choose between them. Both have done a creditable job in exploiting the local service routes for which they have been certificated, and they appear equally capable of doing a similar job for the new Los Angeles-Phoenix route.

Moreover, we do not believe that the record demonstrates that this route can be more readily fitted into the route systems of either carrier for while the western end of the route is contiguous to the trade area now served by Southwest, the eastern end is contiguous to that served by Bonanza, and the cities in the center, that is, El Centro, Yuma, Blythe, and Ajo whose needs are our primary concern in this proceeding, can hardly be said to fall within the natural service orbit of either one. Nor do we believe that the selection of either carrier would impair the possibilities of integration of the carriers' routes since no matter which carrier is selected their routes would become contiguous.[14]

Southwest, in arguing for its selection rather than Bonanza, relies principally on the fact that it can operate the new service more economically. This position is supported by cost estimates submitted by Public Counsel. The estimated difference in cost of operation is 3.23 cents per plane mile in Southwest's favor.

On the other hand, Bonzana urges that it has a greater need than Southwest for additional route mileage and that this proceeding affords the most logical opportunity for strengthening its route pattern. Bonzana is one of the smallest local service carriers, having a route system of only 639 operable miles and serving only eight communities. On the other hand, while not numbered among the

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[13] See pages 13-15 for additional discussion of our reasons for suspending Western's service at El Centro and Yuma.

[14] See *Southwest-West Coast Merger Case*, Order Serial No. E-5594, adopted August 7, 1951, p. 4.

largest local service carriers, Southwest is twice the size of Bonanza and serves more than four times the number of communities; the area it serves is one of comparatively high population density and wealth.[15] With these advantages Southwest has progressed considerably further on the road to economic self-sufficiency than has Bonanza.

Bonanza is now severely hampered by a lack of sufficient traffic and revenue volume over which to spread its overhead costs, and it cannot obtain maximum utilization of its aircraft. In the year ending June 30, 1951, for example, its scheduled daily aircraft utilization was only 4:24 hours, compared with an average of 6:07 hours achieved by other local service operators using DC-3 equipment, and its total operating expense reached 103.70 cents per revenue mile as opposed to an industry average of 98.86 cents. There is no contention before us that the differences indicated by these figures are due to management deficiencies or other factors within the carrier's control, and familiar as we are with the influence of size on relative efficiency and cost, we accept the carrier's contention that the award of additional route miles to its system with the traffic and revenue potential available thereon would tend to lower its system unit operating costs and thus, to improve its economic position.

To the extent that Bonanza's system unit operating costs for its present route are reduced as a result of the route extension here awarded the carrier, the Government will realize a saving in mail pay support for its current route. And, while due primarily to lower operating costs, Southwest would probably be able to operate the Los Angeles-Phoenix route with a lesser sum for mail pay support than will be required therefor by Bonanza, this advantage of Southwest's will tend to be offset by the mail pay support savings on Bananza's present route.

Thus, after full consideration of the record in this proceeding in the light of the well-established Board policies with respect to the selection of carriers to operate local air service routes,[16] and with relation to the Board's responsibilities for the encouragement and development of a self-

[15] These factors may also result in an advantage to Southwest in the comparative amount of off-line revenues which it might obtain if awarded the new segment rather than Bonanza. The amount of such revenues is not conclusively indicated by the record, but does not appear to be substantial.

[16] See footnote 10, *supra*.

sufficient and adequate air transportation system, we have selected Bonanza as the carrier to be authorized to provide the required local air service.

Our conclusion that the public convenience and necessity require the route awarded Bonanza, as previously indicated, requires suspension of Western's service at El Centro and Yuma, and suspension of Frontier's authority to serve the Yuma-Ajo-Phoenix segment which has not been activated. In reaching our conclusion as to the carrier to be selected, we considered carefully the effect on the aforementioned communities of the new routing on which they would be placed, and of the change in carrier which would be rendering the service. We think the advantages to Ajo of having a direct one-carrier service to Los Angeles and Phoenix are obvious, and are more than sufficient to offset any other advantage over Bonanza that Frontier might claim on the record before us. The advantages to Yuma and El Centro of being placed on the new routing and of being given service by Bonanza are less tangible. Yuma will be benefited by being placed upon the route system of a single carrier rather than two. The traffic potential of Yuma is not sufficient for two carriers, and it is doubtful, therefore, whether it would be given the same quality of service by two carriers as it would by one. And both El Centro and Yuma should receive improved service through being served by a local service rather than a trunk carrier. For Bonanza these points represent important traffic centers whose development warrant its best efforts whereas to Western the record indicates they were and are secondary points to which adequate service will be rendered only when some other purpose of the carrier is being served. In this connection, it bears noting that service to these points was only increased from a three times weekly frequency to twice daily after Western was placed on notice that the Board might suspend its authorization to serve the points, and thus adversely affect Western's plan for extension of its route to Phoenix.

The low priority which Western has undoubtedly given to the air transportation needs of these cities does not stem from any inherent hostility to these communities on the part of the carrier but from the fundamental economic fact that a business will ordinarily first seek to exploit the areas of greatest potential profit, leaving the others to some later period of greater relative prosperity. For similar reasons,

in times of economic stress or operational difficulty, the least profitable points are apt to be the first to which service is curtailed. These are factors which support our conclusion that the transportation needs of El Centro and Yuma will, in the long run, be better served by a local service carrier than by a trunk.

It should be further noted that service to Los Angeles, the city with which Yuma and El Centro have their greatest community of interest, over the new routing by Bonanza will be no less convenient than that currently offered by Western. For example, Western operates only one through flight a day in each direction between Los Angeles on the one hand and El Centro and Yuma on the other, the other flight requires a change of plane at San Diego.[17] Bonanza's proposed schedules provide an equally convenient and no less expeditious trip for eastbound or westbound passengers, and all flights are through flights which do not require a change of plane. Moreover, since Bonanza will not have to schedule its equipment with a view to its availability for longer more profitable hauls, it will have sufficient flexibility to permit the scheduling of service which will permit passengers from communities east of San Diego such as Yuma and El Centro to travel to San Diego and Los Angeles, transact their business and return home the same day. It is this type of scheduling which we have pointed out provides the most desirable service for communities on local air service routes.[18]

We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, i.e., on December 31, 1952, when Bonanza's certificate finally expires. However, it is possible that Bon-

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[17] According to the Official Traffic Guide for January 1952, Western has two scheduled departures from Los Angeles to San Diego, El Centro and Yuma. The first, a DC-3 flight, leaves Los Angeles at 7:20 a.m. PST and arrives at Yuma at 10.50 a.m. MST, the second a Convair flight as far as San Diego leaves Los Angeles at 1:25 p.m. PST, arrives at San Diego 2:10, leaves San Diego as a DC-3 flight 10 minutes later arriving at Yuma at 4:45 p.m. MST. The earliest flight to Los Angeles leaves Yuma as a DC-3 flight at 11:10 a.m. MST, changes to Convair equipment at San Diego and arrives at Los Angeles at 12:40 p.m. PST; the later flight leaves Yuma at 7:25 p.m. MST and arrives at Los Angeles at 8:55 p.m. PST.

[18] Western's schedules (see footnote 17, *supra*) permit a Los Angeles resident to travel to Yuma and El Centro, transact business and return the same day but do not permit the El Centro and Yuma passenger the same convenience.

anza's authorization may be temporarily extended by virtue of Section 9(b) of the Administrative Procedure Act [19] and the filing of a timely application by Bonanza for renewal of its authority. If Bonanza's authority were thus extended it would be appropriate to continue the suspension of Western's authority until disposition of Bonanza's application. Otherwise there would result a needless duplication of service at El Centro and Yuma. Accordingly, Western's authority to serve El Centro and Yuma will be suspended up to and including December 31, 1952, or until final determination by the Board of a timely application by Bonanza for renewal of Segment No. 2 of its route No. 105, whichever shall last occur.

We have also considered the question of necessary restrictions on Bonanza's authority to operate the new route segment to prevent the carrier, insofar as practicable, from offering additional through service between Los Angeles-Long Beach on the one hand, and San Diego and Phoenix on the other, or between San Diego and Phoenix. At present, Bonanza has the usual local service restriction in its certificate which requires it to render service to each point between point of origin and point of termination of each flight. It will, therefore, be sufficient for this purpose if we require that trips scheduled between Los Angeles-Long Beach on the one hand and San Diego on the other shall be scheduled to originate or terminate at Phoenix.[20]

On the basis of the foregoing considerations and all the facts of record, we find that the public convenience and necessity require:

1. The amendment of Bonanza's certificate for route No. 105 to include a new segment extending between the coterminal points Los Angeles and Long Beach, Calif., and the terminal point Phoenix, Ariz., via the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego and El Centro, Calif., and Yuma and Ajo, Ariz., and Blythe, Calif.

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[19] Section 9(b) of the Administrative Procedure Act provides, in part, as follows: "* * * In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

[20] In Order Serial No. E-3597, dated November 22, 1949, the Board permitted Bonanza to overfly points on its then existing route. That order is so drawn as to apply only to the route between the terminals Reno, Nev., and Phoenix, Ariz., and would not apply to the new route segment herein awarded to Bonanza.

2. That each trip scheduled by Bonanza between the coterminal points Los Angeles and Long Beach and the intermediate point San Diego shall originate or terminate at Phoenix, Ariz.

3. That Bonanza shall not serve Ajo, Ariz., and Blythe, Calif., on the same flight.

4. Suspension of Western's certificate for route No. 13 with respect to El Centro, Calif., and Yuma, Ariz., until December 31, 1952, or until the date on which the Board shall have finally determined a timely filed application by Bonanza for renewal of Segment No. 2 of route No. 105, whichever shall last occur.[21]

5. Suspension of Frontier's certificate for route No. 93 with respect to service over segment "1" between the terminal points Yuma and Phoenix, Ariz., via Ajo, Ariz.

We also find that Bonanza is a citizen of the United States within the meaning of the Act, and is fit, willing, and able properly to perform the air transportation authorized herein and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder.

In addition, we find that the public convenience and necessity do not require suspension of Western's certificate for route No. 13 insofar as service to San Bernardino and Palm Springs are concerned.

We also find that the applications in this proceeding should be denied in all other respects.

An appropriate order will be entered.

Nyrop, Chairman, Ryan, Lee, Adams, and Gurney, Members of the Board, concurred in the above opinion.

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[21] We will allow the carrier thirty days after the effective date of its amended certificate to wind up its business at El Centro and Yuma.

APPENDIX

Excerpts from the Report of Examiner F. Merritt Ruhlen, Served August 17, 1951, in the Reopened Additional California-Nevada Service Case, Docket No. 2019, *et al.*

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In the original *Additional California-Nevada Service Case,* 10 C.A.B. 405 (1949) Southwest proposed local service in the Los Angeles-San Diego-Phoeniz area. Before that case was decided Western entered into an agreement with Arizona Airways to transfer its San Diego-El Centro-Yuma segment to Arizona Airways, Docket No. 340. In the *Additional California-Nevada Service Case, supra,* the Board deferred decision on Southwest's proposal for local service in this area pending consideration of the transfer of Western's San Diego-Yuma route to Arizona Airways. In the meantime Western filed an application, Docket No. 3768, requesting permission to suspend service on the San Diego-El Centro segment pending inauguration of service by Arizona Airways from Yuma to Phoenix; thereafter Western withdrew its application for permission to suspend service of the San Diego-Yuma segment and for the approval of the transfer of this segment to Arizona Airways, and in Docket No. 3976 applied for the extension of route No. 13 from Yuma to Phoenix. In addition Western filed an application, Docket No. 4007, for expeditious consideration of its Yuma-Phoenix application and for an exemption order authorizing Western to immediately inaugurate Yuma-Phoenix service. This application was denied by the Board by Orders Serial Nos. E-3727, Dec. 19, 1949 and E-3869, February 2, 1950.

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But, before recommending Western it is necessary to consider its fitness, willingness, and ability to provide the proposed services. Western states that it is willing to provide any transportation required in the area in issue, but to determine its fitness, williness and ability, previous actions must be considered as well as promises for the future. An examination of Western's previous service to El Centro and Yuma is in order.

Western was prevented by World War II from inaugurating service to El Centro until 1946; at that time Western established two round trips daily to Los Angeles and gene-

rated a substantial number of passengers.[34] This service was operated for only one year. Shortly thereafter service was dropped to one round trip daily and a little later to three round trips weekly. This type of service continued until January 1950.

When Yuma was added as a certificated point Western provided that city with only three round trips weekly until January 1950 when it inaugurated two round trips per day between San Diego and Yuma via El Centro. This type of service has been continued since that time.

The type of service Western provided El Centro and Yuma during 1947 through 1949 clearly did not meet the minimum requirements for adequate service. The Board has stated that as a general rule, two round trips daily are necessary for adequate service.[35] In the original *California-Nevada Service Case*[36] the Board reiterated this rule but stated that in certain situations one daily round trip might be sufficient. But nowhere has it been indicated that three round trips weekly is sufficient for local short-haul service. This service was so useless that the Post Office Department did not designate any schedules for mail service and the traffic receded from 591 at El Centro in September 1946, with two round trips daily, to 327 during March 1947 with one round trip daily, to 97 in September, 1947, with three round trips weekly. During the 1948 survey months El Centro generated an average of 109 passengers monthly and in 1949 73. At Yuma 60 passengers were generated in September 1947, and during the 1948 and 1949 survey periods an average 55 and 26 monthly passengers, respectively. It was only after the Board had authorized Southwest to provide local service between Los Angeles and Phoenix via San Diego, El Centro, Yuma, Ajo, and other points and had ordered Western to show cause why its authorizations to serve El Centro, Yuma, San Bernardino, and Palm Springs should not be suspended that Western became interested enough in providing El Centro and Yuma with service to install two round trips daily. This belated enthusiasm appears to have resulted from three factors, none of which involved fulfilling its duty to provide these cities with the service needed. First, Western feared com-

[34] In September 1946, El Centro generated 591 passengers.

[36] North Central Case, 7 C.A.B. 639, 680 (1946).

[36] 10 C.A.B. 405. 429 (1949).

petition from Southwest on its Los Angeles-San Diego segment; second, the authorization of Southwest to provide a San Diego-Phoenix service rekindled Western's ambitions and hopes for a San Diego-Phoenix route; and third, Western feared that it might be suspended at San Bernardino and Palm Spring as well as at El Centro and Yuma.[37] Consequently, Western decided to establish more frequent schedules to the points proposed for suspension. Although Western presented no affirmative case to show that additional San Diego-Phoenix terminal-to-terminal service was needed and consented to accept a restriction on its San Diego-Phoenix operation inhibiting effective competition for San Diego-Phoenix and Los Angeles traffic, Western's protestations are not convincing. Based on Western's previous record it would appear that its primary interest in this proceeding is to obtain an unrestricted San Diego-Phoenix route and to use the local service operation as a "stepping stone" or "hat in the door" method of accomplishing this result. It can easily be anticipated that in the event this aim is achieved in this proceeding Western will return to the Board in a short time with an application requesting the lifting of the local service restriction and a story that unless supported by terminal-to-terminal traffic the El Centro-Yuma-Ajo segment will never be economically justified. Based on the record to date Western appears to be a very "reluctant dragon" when it comes to service to El Centro, Yuma, and Ajo. It should be noted that Western did not propose service to Ajo in this proceeding and has shown no interest in the air service needs of that city despite the Board's authorization of Ajo service several years ago. It has expressed a willingness to serve Ajo if the Board finds that such service is required.

Western's treatment of El Centro and Yuma is understandable if not excusible. Western at all times proposed service to El Centro and Yuma on a San Diego-Phoenix route and contended that only with such an operation could satisfactory service be provided in an economical manner. The present record appears to support that contention. When Western failed to obtain that authorization it did some experimenting in attempt to find some economical way to provide adequate service to these cities and then aban-

[37] Palm Springs and San Bernardino can be served on Los Angeles-Las Vegas flights and Palm Springs is a comparatively strong traffic producer during the winter.

doned the job as hopeless. It apparently decided to cut its operating losses on this unprofitable segment by reducing its schedules to the minimum and concentrating its equipment and efforts on more lucrative markets. This practice, if followed by a business operating in a free market, would be sound operating procedure. But the recipient of a certificate of public convenience and necessity receives not only special privileges, such as a right to operate with limited competition and the right to subsidy mail payments, if needed, but also the duty to provide adequate service.